Supreme Court, U.S.
FILED
AUG 31 2000
CLERK

(3)

No. 00-38

In The Supreme Court of the United States

JANET RENO, Attorney General of the United States; ROBERT S. COLEMAN, JR., District Director of the Immigration and Naturalization Service, Seattle; and the UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, PETITIONERS

v.

KIM HO MA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF *CERTIORARI*

THOMAS W. HILLIER, II
Federal Public Defender
for the Western District of Washington

JAY W. STANSELL
Assistant Federal Public Defender
Counsel of Record

JENNIFER E. WELLMAN
Staff Attorney

1111 Third Avenue, Suite 1100
Seattle, Washington 98101
(206) 553-1100
Counsel for Respondent

78pp

QUESTION PRESENTED FOR REVIEW

Kim Ho Ma was six years old when he lawfully entered this country fifteen years ago as a refugee from Cambodia. He became a lawful permanent resident of the United States after that entry but was ordered deported to Cambodia following his conviction of manslaughter in 1997. The Immigration and Naturalization Service (INS) was unable to effectuate his deportation because Cambodia refused to allow his return. However, the INS chose to detain Mr. Ma for almost a year beyond the statutory 90-day removal period (8 U.S.C. § 1231(a)(1)(A)) until the district court ordered him released. The INS maintains that Mr. Ma's detention should continue indefinitely even though they cannot deport him in the foreseeable future, if ever. The governing statute, 8 U.S.C. § 1231(a)(6), provides: "An alien ordered removed . . . who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal, may be detained beyond the removal period and, if released, shall be subject to the terms of supervision in paragraph (3)." The Ninth Circuit Court of Appeals, applying normal tenets of statutory construction and the well-established principle of constitutional avoidance, held that the Attorney General does not have the statutory authority under § 1231(a)(6) to detain Mr. Ma beyond the 90-day removal period where his deportation cannot be effectuated in the reasonably foreseeable future.

The question presented is:

Whether, under 8 U.S.C. § 1231(a)(6), the Attorney General has the statutory authority to indefinitely detain a long-time resident alien of the United States beyond the 90-day removal period even if the deportation order cannot be effectuated in the reasonably foreseeable future?

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW ..... (i)

TABLE OF AUTHORITIES ..... (iv)

OPINIONS BELOW 1

STATUTORY, REGULATORY AND CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE 2

STATEMENT 2

A. Kim Ho Ma and INS Custody 4

B. Administrative Custody Reviews 6

C. District Court Proceedings 8

D. Ninth Circuit Court of Appeals Proceedings 11

SUMMARY OF REASONS FOR DENYING THE WRIT OF *CERTIORARI* 12

REASONS FOR DENYING THE WRIT OF *CERTIORARI* 15

I. THERE IS NO SIGNIFICANT CONFLICT WITH ANY OTHER CIRCUIT COURT OF APPEALS WHICH WARRANTS REVIEW BY THE SUPREME COURT 15

A. There Is No Conflict With the Fifth Circuit 15

B. The Present Conflict with the Tenth Circuit's Divided Decision in Ho v. Greene, 204 F.3d 1045, Is Tenuous at Best and Does Not Warrant *Certiorari* Review at this Time 17

II. *CERTIORARI* REVIEW IS PREMATURE BECAUSE THE STATUTORY ISSUE IS PRESENTLY PERCOLATING IN THE CIRCUIT COURTS OF APPEAL AND THE INS IS IN THE MIDST OF IMPLEMENTING REGULATIONS WHICH MAY ULTIMATELY REGULATE POST-FINAL ORDER DETENTION CONSISTENTLY WITH THE COURT OF APPEALS' DECISION IN MA 20

III. THE COURT OF APPEALS' CONSTRUCTION OF § 1231(a)(6) DOES NOT RESULT IN THE UNPRECEDENTED RELEASE OF CRIMINAL ALIENS 22

IV. THE COURT OF APPEALS' INTERPRETATION OF § 1231(a)(6) IS ENTIRELY CONSISTENT WITH PRINCIPLES OF STATUTORY CONSTRUCTION AND SUPREME COURT PRECEDENT 26

A. The Court of Appeals' Construction of § 1231(a)(6) Is Reasonable; Entirely Consonant with its Terms, Legislative History, and Statutory Evolution; and Appropriately Avoided a Substantial Constitutional Question Raised by Mr. Ma's Ongoing Detention 26

B. The Release of Individuals like Mr. Ma Does Not Impermissibly Intrude on Executive Branch Functions 32

C. The Court of Appeals Properly Reviewed Mr. Ma's Statutory Claim Under the Constitutional Avoidance Doctrine and Not, as Suggested by the Petitioners, A More Deferential Standard of Review 33

D. The Fact of Any Ongoing Negotiations with Cambodia Does Not Warrant a Writ of *Certiorari* 36

CONCLUSION 38

TABLE OF AUTHORITIES

Cases — Page

American Mfrs. Mutual Ins. Co. v. Sullivan, 426 U.S. 40,119 S.Ct. 977 (1999) 9

Barrera-Echavarria v. Rison, 44 F.3d 1441 (9th Cir.) (en banc), cert. denied, 516 U.S. 976 (1995) 16, 18, 31

Battaglia et al. v. General Motors Corp., 169 F.2d 254 (2d Cir.), cert. denied, 335 U.S. 887 (1948) 23

Caranica v. Nagle, 28 F.2d 955 (9th Cir. 1928) 30

Carlson v. Landon, 342 U.S. 524 (1952) 15, 32, 35

Carpenter v. Gomez, 516 U.S. 981 (1995) 23

Carrera-Valdez v. Perryman, 211 F.3d 1046 (7th Cir. 2000) 16, 17

Castillo-Gradis v. Turnage, 752 F.Supp. 937 (S.D. Cal. 1990) 28

Chevron U.S.A. v. NRDC, 467 U.S. 837 (1984) 33, 34

Cuesta-Martinez v. INS, 97 F.Supp.2d 647 (M.D. Pa 2000) 20

Darr v. Burford, 339 U.S. 220 (1950) 22

Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568 (1988) 19, 26

Fiallo v. Bell, 430 U.S. 787 (1977) 34

Foucha v. Louisiana, 504 U.S. 71 (1992) 24

Garcia-Mir v. Smith, 766 F.2d 1478 (11th Cir. 1985), cert. denied, 475 U.S. 1022 (1985) 18

Gilliard v. Mississippi, 464 U.S. 867 (1983) 22

Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) 35

Harisiades v. Shaughnessy, 342 U.S. 580 (1952) 36

Ho v. Greene, 204 F.3d 1045 (10th Cir. 1999) 13, 17-18

INS v. Aguirre-Aguirre, 526 U.S. 415 (1999) 33-34, 36

INS v. Chadha, 462 U.S. 919 (1983) 35

Johns v. Dep't of Justice, 653 F.2d 884 (5th Cir. 1981) 28

Jones v. United States, -- U.S. --, 120 S.Ct. 1904 (2000) 19

Kansas v. Hendricks, 521 U.S. 346 (1997) 4, 25

Kleindienst v. Mandel, 408 U.S. 753 (1972) 34

Kwong Hai Chew v. Colding, 344 U.S. 590 (1953) 19

Landon v. Plasencia, 459 U.S. 21 (1982) 19,32

Ma v. Reno, 208 F.3d 815 (9th Cir.), reh'g and reh'g en banc denied (June 2, 2000) .... passim

Marquez-Medina v. Meese, 475 U.S. 1022 (1986) 18

Mathews v. Diaz, 426 U.S. 67 (1976) 19, 32, 36

McCray v. New York, 461 U.S. 961 (1983) 21

Metheny v. Hamby, 488 U.S. 913 (1988) 17

Ngo v. INS, 192 F.3d 390 (3d Cir. 1999) 16

Oguachuba v. INS, 706 F.2d 93 (2d Cir. 1983) 28

Petition of Brooks, 5 F.2d 238 (D. Mass. 1925) 30

Plyler v. Doe, 457 U.S. 202 (1982) 19, 31

Pril v. Greene, No. 99-1303 (D. Colo. 1999), *appeal docketed*, No. 99-1303 (10th Cir.) 17

Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981) 18

Russell v. Southard, 53 U.S. 139 (1851) 37

Rust v. Sullivan, 500 U.S. 173 (1991) 34

Saksagansky v. Weedin, 53 F.2d 13 (9th Cir. 1931) 30

Sanson Hosiery Mills v. NLRB, 344 U.S. 863 (1952) 16

Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953) 18

Similien v. United States, appeal docketed, No. 98-2958 II (11th Cir. 2000) 21

Sokol Bros. Co. v. Commissioner, 340 U.S. 952 (1951) 18

Taylor v. United States, appeal docketed, No. 99-12614-BB (11th Cir. 2000) 21

Texas v. Mead, 465 U.S. 1041 (1984) 37

The Arlington, Inc. v. Mayer, 339 U.S. 965 (1950) 16

United States ex rel Ross v. Wallis, 279 F. 401 (2d Cir. 1922) 30

United States v. Johnson, 268 U.S. 220 (1925) 16, 37

United States v. Salerno, 481 U.S. 739 (1987) 4

United States v. Witkovich, 353 U.S. 194 (1954) 19, 26, 32, 34-36

United States v. X-Citement Video, Inc., 513 U.S. 64 (1994) 16, 19

Vo v. Greene, 63 F.Supp.2d 1278 (D. Colo. 2000),
appeal pending No. 99-1491 (10th Cir.) 13, 17

Wolck v. Weedin, 58 F.2d 928 (9th Cir. 1932) 30

Wong Wing v. United States, 163 U.S. 228 (1896) 19, 32, 35

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 32

Zadvydas v. Underdown, 185 F.3d 279 (5th Cir. 1999),
petition for cert. filed (U.S. Jan. 11, 2000) (No. 99-7791) 13, 15-16

Constitution and Statutes

U.S. Const. amend. V 2, 8, 25, 31

8 C.F.R. § 241.5 23

8 C.F.R. § 241.4 2

8 U.S.C. § 1101(a)(43)(F)(1996) 5

8 U.S.C. § 1226 15

8 U.S.C. § 1231(a)(3) 2

8 U.S.C. § 1231(a)(6) ..... passim

8 U.S.C. § 1253(b) 2

8 U.S.C. §1253(h)(2)(C) 33-34

8 U.S.C. §§ 1231(a)(1)(A), (a)(1)(C), (b)(2)(C), (b)(2)(D), (c)(3)(A) and (c)(3)(B) 27

former 8 U.S.C. § 1252(a)(2)(B) (1991) 29

former 8 U.S.C. § 1252(c) (1952) 28-29

former 8 U.S.C. §§ 1252(a)(2)(A) & (B) (1991) 28-29

Rev. Code Wash. 9.92.151 (1990) 4

Rev. Code Wash. 9.94A.310 (1995) 5

Rev. Code Wash. 9.94A.320 (1995) 5

Rev. Code Wash. 9A.32.060 (1975) 5

§ 303(b)(3) of IIRIRA 29

§440(c) of Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) 29

Supreme Court Rule 26 36

Federal Rule of Appellate Procedure 10 36

Federal Rule of Appellate Procedure 23 37

Other Authorities

Federal Bureau of Prisons, *Memorandum to All Chief Probation Officers* (April 6, 2000) <http://156.119.80.10/courtoperations/fcsd/html/memos/fcsd00025.htm> 23

U.S. Dept. of Justice, Immigration and Naturalization Service, *1997 Statistical Yearbook of the Immigration and Naturalization Service*, 167 (1997) 24

Appendix A ..... (1a)

Appendix B 4a

Appendix C 6a

Appendix D 7a

Appendix E 9a

Appendix F 12a

Appendix G 13a

Appendix H 19a

Appendix I 20a

Appendix J 21a

Appendix K 25a

Appendix L 27a

Appendix M 28a

IN THE SUPREME COURT OF THE UNITED STATES

No. 00-38

JANET RENO, et al., PETITIONERS
v.
KIM HO MA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF *CERTIORARI*

OPINIONS BELOW

The petition for *certiorari* correctly cites the district court opinion ordering an evidentiary hearing, reported at 56 F. Supp. 2d 1165 (W.D. Wash. 1999), App. C to Pet. for Cert. 52a-54a, the district court opinion granting Mr. Ma's writ of habeas corpus, which is not reported, App. D to Pet. for Cert. 55a-61a, and the April 10, 2000, reported Court of Appeals for the Ninth Circuit opinion affirming the district court order, 208 F.3d 815 (9th Cir. 2000). App. A to Pet. for Cert. 1a-33a. The June 2, 2000, opinion of the court of appeals denying rehearing and rehearing en banc is not reported. App. E to Pet. for Cert. 62a-63a.

The district court opinion denying the Petitioners' motion to stay Mr. Ma's release pending their appeal to the court of appeals is not reported. App. A, *infra*, 1a-3a. The court of appeals opinions denying motions to stay Mr. Ma's release pending appeal to the court of appeals are not reported. App. B, *infra*, 4a-5a. The court of appeals' opinion denying the Petitioners'

motion to stay Mr. Ma's release pending their application to the Supreme Court to stay Mr. Ma's release is not reported. App. C, *infra*, 6a. The Supreme Court's order denying the Petitioners' application to stay Mr. Ma's release pending their appeal is reported at 528 U.S. --, 120 S.Ct. 466 (1999). App. D, *infra*, 8a.

STATUTORY, REGULATORY AND CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

The petition for *certiorari* correctly cites the statutory and regulatory provisions involved in the case, 8 U.S.C. § 1231(a)(6), 8 C.F.R. §241.4, and § 1231(a)(3). The additional statutory provision governing Mr. Ma's release is 8 U.S.C. § 1253(b) which provides:

> An alien who shall willfully fail to comply with regulations or requirements issued pursuant to section 1231(a)(3) of this title or knowingly give false information in response to an inquiry under such section shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

The constitutional provision involved is the Fifth Amendment Due Process Clause which provides, in relevant part: "No person shall . . . be deprived of life, liberty or property, without due process of law[.]"

STATEMENT[1]

Kim Ho Ma lawfully entered the United States years ago but was convicted of a crime in 1997. Following completion of his sentence, he was taken into Petitioner INS's custody and ordered deported. However, the INS was unable to effectuate his deportation because Cambodia

---

[1] Mr. Ma has confined the following Statement to those facts which are either inaccurately stated in, or omitted from, the recitation of facts in the petition for *certiorari*. The court of appeals' opinion correctly sets forth the facts of the case and the procedural background. Ma v. Reno, 208 F.3d 815, 818-20 (9th Cir.), reh'g and reh'g en banc denied (June 2, 2000). And for the convenience of the Court, Mr. Ma has cited to the reported circuit and district court decisions as they appear in the Appendix to the Petition for *Certiorari*.

refused to accept his return. Despite its inability to deport Mr. Ma or estimate a time in the future when his deportation could be effectuated, the INS continued to detain him. Petitioners contend that they have the authority to detain Mr. Ma indefinitely even though his deportation order cannot be effectuated. Mr. Ma challenged that position by writ of habeas corpus on statutory and constitutional grounds. Both of the lower courts ruled in Mr. Ma's favor. The court appeals held that the INS has the statutory authority to detain an individual like Mr. Ma beyond the 90-day removal period only for a "reasonable time" in order to effectuate deportation. App. A to Pet. for Cert. 31a. The circuit court stated,

> [i]n cases in which an alien has already entered the United States and there is no reasonable likelihood that a foreign government will accept the alien's return in the reasonably foreseeable future, . . . the statute does not permit the Attorney General to hold the alien beyond the statutory removal period. Rather, the alien must be released subject to the supervisory authority provided in the statute.

Id. at 11a; see also id. at 31a.

The court of appeals reasoned that the Petitioners' construction of the statute -- which would permit the indefinite, potentially lifetime detention of Mr. Ma even though his deportation order cannot be effectuated -- raised serious constitutional problems. App. A to Pet. for Cert. 11a-24a; see also App. D to Pet. for Cert. 61a (granting writ on constitutional grounds). Consistent with well-established rules of statutory construction, the circuit court construed the statute to avoid such problems. App. A to Pet. for Cert. 11a-24a. Because its analysis was dispositive of the Petitioners' appeal, the circuit court did not reach the alternative constitutional claims. Id. at 22a. Accordingly, the question presented by this case is simply whether the statute, § 1231(a)(6), permits Mr. Ma's indefinite detention even though his deportation order cannot be

effectuated in the reasonably foreseeable future.[2]

A. Kim Ho Ma and INS Custody.

Kim Ho Ma and his family fled Cambodia when Mr. Ma was only two years old. They entered the United States lawfully as refugees four years later in 1985 when Mr. Ma was six years old. Mr. Ma became a lawful permanent resident in 1987 and has continuously resided in this country since his entry. App. A to Pet. for Cert. 4a.

At the age of seventeen, Mr. Ma was convicted of first degree manslaughter, and served 26 months of a 38-month sentence with time off for good behavior. Rev. Code Wash. 9.92.151 (1990); App. D to Pet. for Cert. 5a.[3] In June of 1997, the INS took Mr. Ma into custody after he

---

[2] Under the court of appeals' legal analysis, the critical inquiry is whether the deportation order can be effectuated in the "reasonably foreseeable future," not whether the individual's removal will happen "immediately" or whether his detention is permanent, as suggested in the petition for *certiorari*. App. A to Pet. for Cert. 31a.

Similarly, the Petitioners' incorporation of "flight risk" and "danger to the community" into the question presented further misstates the statutory analysis of the circuit court. These factors have no relevance to the statutory analysis but pertain only to the constitutional question -- whether such detention is excessive in relation to a legitimate government purpose. See, e.g., App. D to Pet. for Cert. 60a; App. B to Pet. for Cert. 47a. See also generally United States v. Salerno, 481 U.S. 739, 746-49 (1987); Kansas v. Hendricks, 521 U.S. 346, 358 (1997). For this same reason, the Petitioners' heavy reliance on the existence of an administrative custody review process and incorporation of that fact into the question presented is misplaced. Moreover, these factors (of flight risk or danger to the community) have no relevance in this case because "the government has never suggested [Mr. Ma] is a flight risk" and there is no evidence of present danger to the community. App. D to Pet. for Cert. 60a & 60a n.3 & n.4; see also, *infra*, pp. 4-10, 10 n.12, 24-25.

[3] The Petitioners' description of Mr. Ma's conviction in the petition for *certiorari* as an intentional offense is inaccurate. It is apparently drawn from the affidavit of probable cause supporting the state's charges of murder in the first degree and murder in the second degree, charges on which Mr. Ma was not convicted. Certified Administrative Record (AR) 144-148. Although Mr. Ma was only 17 years old when convicted, he "was tried as an adult on a charge of murder in the first degree. The jury acquitted him of first degree murder, hung on the charge of second degree murder, and convicted [Mr.] Ma of first degree manslaughter." App. D to Pet. for

completed his state sentence. Pending completion of the deportation proceedings, an Immigration Judge determined that Mr. Ma was not a flight risk but nevertheless denied the request for bond "strictly because of the seriousness of his crime." App. D to Pet. for Cert. 57a. Subsequent requests by Mr. Ma for release on bond pending completion of his deportation proceedings were denied solely because of Mr. Ma's manslaughter conviction, which is his only criminal conviction. App. A to Pet. for Cert. 5a.[4]

Mr. Ma does not contest the validity of his deportation order to Cambodia, which was entered on September 12, 1997, and affirmed by the Board of Immigration Appeals (BIA) on October 26, 1998.[5] App. A to Pet. for Cert. 4a.[6]

Cert. 56a & 60a n.4. Manslaughter in the first degree is statutorily defined in Washington as "recklessly caus[ing] the death of another person," with a maximum possible sentence of 10 years and a sentencing range of 31 to 41 months based on Mr. Ma's criminal record of no prior convictions. Rev. Code Wash. 9A.32.060 (1975); Rev. Code Wash. 9.94A.320 (1995); Rev. Code Wash. 9.94A.310 (1995).

[4] The psychological evaluation referenced in the petition for *certiorari*, Pet. for Cert. 6 & n.2, was performed in 1997 by the Department of Corrections, not the INS, and was not relied upon by the INS to support its conclusion that Mr. Ma posed a danger to the community if released pending removal to Cambodia. App. H to Pet. for Cert. 77a-86a; AR 49-54. The dated report nevertheless characterized Mr. Ma as a "frightened boy" who could be released with supervision. AR 49-54. And, as instructed by the author of the 1997 report, "caution is indicated in generalizing from the information provided in this report. Psychological test data alone have not been found adequate as predictors of an individual's behavior in a setting different from the testing situation." AR 54. The INS itself concluded two years later that Mr. Ma has no "significant" mental health issues. App. H to Pet. for Cert. 80a.

[5] Mr. Ma's applications for asylum and withholding were denied based on the Immigration Judge's finding, which was affirmed by the BIA, that Mr. Ma was ineligible for such relief, in light of his conviction for a crime classified by 8 U.S.C. § 1101(a)(43)(F) (1996) as an aggravated felony. App. A to Pet. for Cert. 4a.

[6] While Mr. Ma does not disagree that the final order of deportation eliminated Mr. Ma's lawful permanent residence status, 8 C.F.R. § 1.1(p), he does dispute any suggestion by the Petitioners that this change in Mr. Ma's immigration status strips him of, or otherwise defines his

As noted in the petition for *certiorari*, the INS could not effectuate Mr. Ma's deportation to Cambodia within the 90-day removal period. Over six months after Mr. Ma's removal order became final (and after his habeas petition was filed), the INS requested travel documents from the Cambodian government. App. A to Pet. for Cert. 5a. The INS never received a response because Cambodia ignores or refuses to grant such requests as a matter of course, absent a repatriation agreement with the United States. App. A to Pet. for Cert. 5a & n.4; see also App. D to Pet. for Cert. 58a (quoting pleadings by Petitioners' herein regarding Cambodia's failure to issue any travel documents); App. E, *infra*, 9a-11a. And despite the United States' ongoing negotiations to reach such an agreement, no such agreement currently exists. App. D to Pet. for Cert. 58a-59a. In July and September of 1999, the Consulate of Cambodia confirmed that Cambodia would not issue the requisite travel documentation for Mr. Ma, or any other Cambodian national. App. F, *infra*, 12a; App. E, *infra*, 10a-11a.[7] Nonetheless, the INS refused to release Mr. Ma. He therefore remained confined in INS custody from June of 1997, until the district court ordered his release in September of 1999, almost a year after the deportation order became final. App. A to Pet. for Cert. 5a.

B. Administrative Custody Reviews.

In April 1999, Mr. Ma requested an administrative custody review by the INS in the presence of counsel. On or about May 6, 1999 (190 days after his deportation order became final), Mr. Ma and counsel met with an INS deportation officer regarding his request for release.

---

constitutional rights. See, *infra*, pp. 18-20, 31-32.

[7] To counsel's knowledge, the INS has not been able to deport any national of Cambodia who, like Mr. Ma, has been a long-time resident of the United States, over at least the past decade. See, e.g., App. D to Pet. for Cert. 59a; App. E, *infra*, 9a-11a.

Mr. Ma asserted that he would abide by all conditions of release and cooperate with the INS in securing the requisite travel documents. He also submitted numerous letters of support. App. A to Pet. for Cert. 5a-6a.

By a form letter dated June 2, 1999, INS Deputy District Director George Morones denied Mr. Ma's request for release. "[T]he letter neither stated reasons nor discussed which factors were relied upon in reaching the decision to deny Ma's release." App. A to Pet. for Cert. 6a. Nor did the letter indicate any consideration of Mr. Ma's INS detention to date or the potentially indefinite detention faced in light of Cambodia's expressed refusal to issue the requisite travel documents for Mr. Ma's deportation. App. H to Pet. for Cert. 77a-78a. "The letter added that 'there is no appeal from this decision.'" App. A to Pet. for Cert. 6a. The deportation officer's report and recommendation on which Mr. Morones relied in making his June 1999 decision accurately reflects many positive equities in Mr. Ma's case and lists only three factors weighing against his release: past gang affiliation,[8] his single criminal conviction, and Mr. Ma's planned participation in a hunger strike while in INS custody. Id. at 6a-7a; App. H to Pet. for Cert. 79a-85a.[9]

INS Headquarters, in a report dated September 30, 1999, recommended that the INS continue Mr. Ma's detention based solely upon his criminal conviction and participation in a hunger strike. App. A to Pet. for Cert. 7a; App. I to Pet. for Cert. 87a-89a.

---

[8] Mr. Ma's "history of gang activities" consists solely of the manslaughter offense for which he was convicted. App. D to Pet. for Cert. 60a n.3.

[9] Although the petition for *certiorari* correctly notes that Mr. Ma was at one time transferred from one INS facility to another, it omits the fact that the transfer occurred as a result of his "planned participation in a hunger strike," his "only 'behavioral problem'" during his more than two years in INS custody. App. D to Pet. for Cert. 60a n.3.

C. District Court Proceedings.

By petition for writ of habeas corpus, Mr. Ma alleged that his ongoing INS detention, where his deportation could not be effectuated in the reasonably foreseeable future, was excessive in violation of his Fifth Amendment right to substantive due process of law.[10] App. G, *infra*, 14a-15a. Alternatively, Mr. Ma alleged that, even if his ongoing detention did not violate his substantive due process rights, the administrative custody review process implemented by the INS (on its face and as applied to Mr. Ma) was devoid of the fundamental components of procedural due process. Id.; App. B to Pet. for Cert. 34a-36a & 35a n.1. Mr. Ma further challenged, via *Amicus* American Civil Liberties Union Foundation, the INS's statutory authority to detain an individual beyond the 90-day removal period where that individual's deportation cannot be effectuated. App. B to Pet. for Cert. 35a.

By Joint Order, the entire district court for the Western District of Washington rejected the Petitioners' contention that the continued detention of individuals subject to a final order of deportation was a constitutional exercise of the Attorney General's power over immigration matters. Id. at 41a-51a. The district court set forth a legal framework to guide the district courts' individual consideration of the many petitions pending in the district in which the individual challenged his ongoing INS detention on substantive due process grounds: "The critical inquiry. . . is whether an alien's detention is excessive in relation to the[] government interest[]" in "ensuring the removal of aliens ordered deported" and the goals incidental to that interest of "preventing flight prior to deportation" and "protecting the public from dangerous felons." Id. at

---

[10] Mr. Ma further argued that, even if his deportation was reasonably foreseeable, there was no evidence of present dangerousness or flight risk that would justify his ongoing detention consistent with the mandates of the Fifth Amendment. App. G, *infra*, 14a-15a.

47a. The court held that "[i]n making this determination, [the court] must necessarily balance the likelihood that the government will be able to effectuate deportation, against the dangerousness of a petitioner and the likelihood that he will abscond if released." Id.[11]

Thereafter, in this case, the district court ordered an evidentiary hearing, in part to determine the extent of the Petitioners' efforts to repatriate Mr. Ma and the likelihood of effectuating his deportation. App. C to Pet. for Cert. 53a-54a. By stipulation, the parties filed supplemental pleadings in lieu of an evidentiary hearing. App. D to Pet. for Cert. 57a-58a. On September 29, 1999, based upon its consideration of all the evidence presented by both parties, the district court concluded that Mr. Ma's deportation was not reasonably foreseeable, and therefore, that Mr. Ma's ongoing detention was excessive in violation of his substantive due process rights. App. D to Pet. for Cert. 60a; see also App. A to Pet. for Cert. 2a & n.2. Alternatively, the district court held his "interest in liberty clearly outweighs the government's present interests in detaining him" because:

> [e]ven if there were a realistic chance of deporting Ma, the government has not shown a strong interest in continuing his detention based upon his threat to the public or his proclivity to abscond. The government has never suggested he is a flight risk, and it has failed to advance a single reason for its belief that he is a

[11] The entire district court further found that the procedures governing the detention of individuals subject to a final order of removal -- on their face -- deprived the individuals of their respective rights to procedural due process of law. App. B to Pet. for Cert. 47a-52a (noting reliance on past criminal history and fact that individual is facing removal from United States to summarily conclude that the alien poses a risk of flight or danger to the community does not comport with due process). "At a minimum, each petitioner is entitled to a fair and impartial hearing before an immigration judge at which he or she can present evidence to support release pending deportation." Id. at 51a. However, neither the district court in this case nor the court of appeals reached Mr. Ma's procedural due process claim in light of its resolution of the petition on an alternative, dispositive ground. App. A to Pet. for Cert. 7a & 11a n.14. Accord American Mfrs. Mutual Ins. Co. v. Sullivan, 426 U.S. 40, 119 S.Ct. 977, 990 (1999) (courts need not reach an alternative claim where it can resolve case on another dispositive issue).

> danger to society, beyond the simple fact of his conviction. While the crime of which Ma was convicted is serious, it is not the kind that might justify indefinite detention. The record does not indicate his release with proper parole conditions would endanger the community.

App. D to Pet. for Cert. at 60a-61a (footnotes omitted). Because the district court's resolution of the substantive due process claim was dispositive of Mr. Ma's petition, the district court did not reach Mr. Ma's claim that his ongoing detention violated his rights to procedural due process of law. Id. at 61a n.5.

Mr. Ma was released on October 25, 1999, following the Petitioners' unsuccessful attempts to secure a stay of his release from the district court or the court of appeals. App. A to Pet. for Cert. 7a & n.9; App. A, *infra*, 2a-3a; App. B, *infra*, 4a-5a. On November 2, 1999, Mr. Ma voluntarily surrendered to INS custody following the Honorable Justice Sandra Day O'Connor's interim stay of the district court's release order, pending her receipt of briefing from Mr. Ma and consideration of the Petitioners' application to the Supreme Court to stay his release. App. D, *infra*, 7a. On November 12, 1999, the entire Supreme Court, by Justice O'Connor's referral, denied the Petitioners' application for a stay of Mr. Ma's release. App. D, *infra*, 8a. Mr. Ma was released and remains today with his family at their home in Kent, Washington.[12]

[12] The petition for *certiorari* notes Mr. Ma's March 30, 2000 arrest on an allegation of misdemeanor assault. Mr. Ma was released on the evening of his arrest on $1,000 bond and his agreement to abide by a no-contact order with the alleged victim. At an arraignment hearing the next afternoon in Kent Municipal Court, after argument, the court rejected the prosecutor's request for an increase in bond to $5,000, and ordered Mr. Ma's continued release on these same conditions. After Mr. Ma timely reported his arrest to the INS, the INS demanded his surrender based solely upon his arrest. Although Mr. Ma agreed to voluntarily surrender if so ordered, Mr. Ma objected to the INS's attempt to summarily revoke the district court order releasing him without any hearing or proof, and without application to the district court to modify its release order under Fed. R. App. P. 23. Following the court of appeals' decision in this case, the INS suspended indefinitely its letter of intent to summarily revoke his release order. App. H, *infra*, 19a. On June 26, 2000, the Kent Municipal Court dismissed the misdemeanor case with

D. Ninth Circuit Court of Appeals Proceedings.

A three-judge panel of the court of appeals unanimously affirmed the district court order granting Mr. Ma's writ of habeas corpus and ordering his release. The circuit court recognized its obligation to first determine whether Congress provided the INS with the statutory authority to detain Mr. Ma indefinitely, as urged by the Petitioners. App. A to Pet. for Cert. 8a. The court held that the Attorney General has the statutory authority to detain an individual for a reasonable time beyond the 90-day removal period "in order to accomplish the statutory purpose -- the removal of the alien," but she does not have the authority to detain that same individual beyond the statutory removal period if his deportation cannot be effectuated in the reasonably foreseeable future. App. A to Pet. for Cert. 25a & 31a.

Because the relevant statute, 8 U.S.C. § 1231(a)(6), "is silent about how long beyond the ninety-day removal detention is authorized" the circuit court reasoned that "any construction of the statute must read in some provision concerning the length of time beyond the removal period detention may continue, whether it be 'indefinitely,' 'for a reasonable time,' or some other temporal measure." App. A to Pet. for Cert. 9a-10a. In reaching this conclusion, the circuit court construed the ambiguous statute consistent with its obligation to avoid a substantial constitutional problem raised by the indefinite detention of a deportable but unremovable person. App. A to Pet. for Cert. 11a-24a. And based upon its consideration of the provision's terms, legislative history and statutory evolution, as well as case law interpreting analogous immigration laws, the circuit court concluded that its construction is not "plainly contrary to the intent of Congress." Id. at 24a-29a; see also id. at 29a-31a (considering international law proscription against

---

prejudice, which the City of Kent has appealed.

prolonged and arbitrary detention).

Applying the statutory analysis to the facts of Mr. Ma's case, the court of appeals found that, despite the good faith efforts of the United States to continue negotiations with Cambodia, Mr. Ma's removal to Cambodia is not reasonably foreseeable, and affirmed the district court's order granting the writ and ordering Mr. Ma's release. Id. at 25a, 32a & n.30 ("[B]oth sides agree that the United States has no functioning repatriation agreement with [Cambodia], that the Cambodian government does not presently accept the return of its nationals from the United States, and that it has not announced a willingness to enter into an agreement to do so in the foreseeable future, (or indeed at any time).").[13]

The Petitioners' request for rehearing en banc was denied on June 2, 2000. App. E to Pet. for Cert. 62a-63a.

SUMMARY OF REASONS FOR DENYING THE WRIT OF *CERTIORARI*

Certiorari review is not warranted for four reasons. First, there is no circuit split which would warrant *certiorari* review. As the Solicitor General recently acknowledged in his

---

[13] Contrary to the Petitioners' representations, the existence of a repatriation agreement is not central to the circuit court's legal holding. Pet. for Cert. 16 n.9. The court of appeals decision requires the court to determine whether removal in each individual case is reasonably foreseeable, not whether a repatriation agreement exists. And, as explicitly stated by the court of appeals, "what constitutes a reasonable time will depend on the circumstances of the various cases." App. A to Pet. for Cert. 31a. Here, nothing in the circuit court opinion prevents the INS from detaining persons ordered deported beyond the 90-day removal period if they can, in fact, be removed despite the lack of a repatriation agreement. As the circuit court noted, there are "various reasons" why an alien cannot be removed within the 90-day period. App. A to Pet. for Cert. 8a. The undisputed evidence in this case, however, has always indicated that Mr. Ma could not be removed to Cambodia because a repatriation agreement is necessary before Cambodia will even consider issuing the requisite travel documents for a particular individual, and no such agreement currently exists. Id. In other words, this factor relates solely to the particular facts of Mr. Ma's case, not to the statutory construction of § 1231(a)(6).

opposition to *certiorari* in Zadvydas v. Underdown, 185 F.3d 279 (5th Cir. 1999), *petition for cert. filed* (U.S. Jan. 11, 2000) (No. 99-7791), the instant case does not squarely conflict with Zadvydas because the Fifth Circuit did not address the statutory analysis decided by the court of appeals in Ma. Nor does any conflict with the Tenth Circuit's divided decision in Ho v. Greene, 204 F.3d 1045 (10th Cir. 1999), warrant a writ of *certiorari*. Because rehearing was denied in Ho on grounds unrelated to the merits of the statutory claim, the Tenth Circuit did not have the opportunity to consider en banc the Ho panel decision. However, the Tenth Circuit is currently considering a petition for immediate en banc review of the Ho decision in Vo v. Greene, 63 F.Supp.2d 1278 (D. Colo. 2000), *appeal pending* No. 99-1491 (10th Cir.). Ho, which contains only a brief statutory discussion, preceded the Ma decision and therefore, did not benefit from Ma's exhaustive statutory analysis. But the Tenth Circuit, if hearing en banc in Vo is granted, will have that opportunity in the near future.

Second, *certiorari* review is premature because the statutory issue, which is currently presented in cases pending before several courts of appeals and district courts across the country, has only recently begun to percolate through the federal courts. Indeed, the INS is in the process of revising its regulations governing post-order detention. Therefore, the INS may remedy any present conflict on its own, without necessitating further guidance from the Supreme Court.

Third, the court of appeals' decision is entirely consistent with the INS's longstanding approach to deportable aliens, and will not cause the unprecedented release of dangerous criminal aliens. Mr. Ma, and others like him, have served their terms of imprisonment for their prior offenses and were ordered released by the criminal justice system long ago. The INS has traditionally released these individuals under orders of supervision and continues to do so today.

And, under Ma, the courts below are not summarily opening INS's doors but continue to reach individualized release decisions based upon the facts of the particular case.

Finally, a writ of *certiorari* is not warranted because the court of appeals' interpretation of § 1231(a)(6) is entirely consistent with principles of statutory construction and Supreme Court precedent. The circuit court's statutory analysis considers the plain language of the provision, the history and structure of the entire statutory scheme of which it is a part, as well as Congressional intent, and follows this Court's traditional constitutional avoidance doctrine; it is plainly correct. Moreover, nothing in the court of appeals' decision usurps or otherwise impermissibly infringes upon the Attorney General's authority in immigration matters. The fact of any ongoing negotiations with Cambodia does not affect the circuit court's statutory analysis or compel a contrary result in this case.

For all of these reasons, each of the Petitioners' arguments made in support of *certiorari* review is without merit; a writ of *certiorari* is entirely premature and unwarranted.

///

///

///

///

///

///

///

///

///

REASONS FOR DENYING THE WRIT OF *CERTIORARI* [14]

I. THERE IS NO SIGNIFICANT CONFLICT WITH ANY OTHER CIRCUIT COURT OF APPEALS WHICH WARRANTS REVIEW BY THE SUPREME COURT.

A. There Is No Conflict With the Fifth Circuit.

The Petitioners suggest that a conflict exists with the Fifth Circuit decision in Zadvydas, 185 F.3d 279. Pet. for Cert. 24-26. At the same time, the Solicitor General recently stated in his opposition brief to *certiorari* review in Zadvydas that, "the Fifth Circuit did not address the statutory issue decided by the Ninth Circuit in Ma, and the Ninth Circuit in Ma did not reach the constitutional issue decided by the Fifth Circuit in this case. There accordingly is no conflict

---

[14] On August 24, 2000, undersigned counsel received The Washington Legal Foundation and Allied Educational Foundation motion for leave to file an *amicus* brief in support of the petition for *certiorari* and corresponding brief. Amicus' motion for leave to file a brief should be denied. Most of the factual and legal contentions are repetitious of those made in the petition for *certiorari* and are, therefore, addressed in the body of this opposition brief. However, the *amicus* brief asserts two points not mentioned in the petition for *certiorari*: (1) statistics indicate, from *amicus'* perspective, that individuals like Mr. Ma are likely to be recidivist. Brief for Amicus at 7-8; and (2) based on 8 U.S.C. § 1226, a provision which the Petitioners have never invoked in this case (presumably because it governs detention before issuance of a final order), the court of appeals lacked jurisdiction to decide the statutory question of whether 8 U.S.C. § 1231(a)(6) authorizes Mr. Ma's indefinite detention. Brief for Amicus at 13-16.

As to the statistics cited, the Los Angeles study tracked recidivism among aliens who were unlawfully present in the United States, not long-time lawful residents like Mr. Ma. And their reliance on these statistics, even assuming *arguendo* they were factually relevant, ignores this Court's admonitions that "purpose to injure" cannot be "imputed generally to all aliens subject to deportation." Carlson v. Landon, 342 U.S. 524, 538 (1952).

As to the jurisdictional argument, 8 U.S.C. § 1226, section 236 of the Immigration and Nationality Act (INA), covers only the detention of aliens before a final order issues and the jurisdiction provision in that section is explicitly limited to decisions "under [§ 1226]." The Petitioners have never relied on § 1226 to authorize Mr. Ma's detention. Accordingly, any jurisdictional provision relating to detention under § 1226 is irrelvant to this case. See App. A to Pet. for Cert. 3a n.3.

between the Fifth Circuit and the Ninth Circuit[.]" Brief for Respondents in Opposition at 16-17, Zadvydas, (U.S. Jan. 11, 2000) (No. 99-7791).

The Solicitor General's conclusion about a lack of conflict is correct. Compare Zadvydas, 185 F.3d at 294-96 (relying on precedents dealing with excludable aliens, found ongoing detention constitutional) with App. A to Pet. for Cert. 22a (the Ma court avoided the constitutional question entirely by resolving the case on statutory grounds); see also United States v. X-Citement Video, Inc., 513 U.S. 64, 86 (Scalia, J., joined by Thomas, J., dissenting) (articulating distinction between interpreting a statute to avoid substantial constitutional question and finding statute unconstitutional).[15] The Zadvydas decision does not, therefore, create a circuit split sufficient to warrant *certiorari* review. See, e.g., Sanson Hosiery Mills v. NLRB, 344 U.S. 863 (1952); The Arlington, Inc. v. Mayer, 339 U.S. 965 (1950).[16]

---

[15] The Fifth Circuit's decision is also distinguishable on the facts. Zadvydas was based upon a lengthy factual analysis of the circumstances of the particular petitioner which led to the court's ultimate conclusion that the alien's deportation was possible. Zadvydas, 185 F.3d at 291-94. It is unclear at this time whether the decision will be interpreted by the Fifth Circuit as limited to the facts and circumstances of that particular case, namely to aliens whose deportation can, in fact, be effectuated. But to the extent any present conflict arises from mere differences in the factual scenarios of the respective cases, *certiorari* is not warranted. See, e.g., United States v. Johnson, 268 U.S. 220, 227 (1925).

[16] The Petitioners also make a cursory reference to the Third Circuit's decision in Ngo v. INS, 192 F.3d 390 (3d Cir. 1999), to further suggest *certiorari* review is warranted. Pet. for Cert. 23 n.14. However, as the Third Circuit expressly recognized, the petitioner in Ngo is an "excludable" alien, i.e., he was never formally admitted to this country, but was merely paroled into the United States, which parole was ultimately revoked. Ngo, 192 F.3d at 392 & n.1. The Third Circuit specifically expressed no opinion to the indefinite detention of long-time residents who, like Mr. Ma, have been ordered deported. Id. at 398; App. A to Pet. for Cert. 14a-22a.

For these same reasons, the Petitioners' reliance on the Seventh Circuit's decision in Carrera-Valdez v. Perryman, 211 F.3d 1046 (7th Cir. 2000), is misplaced. Pet. for Cert. 25 n.15. Carrera-Valdez, like Ngo and Barrera-Echavarria v. Rison, 44 F.3d 1441 (9th Cir.) (en banc), cert. denied, 516 U.S. 976 (1995), involved the constitutional right of an "excludable" alien to be

B. The Present Conflict with the Tenth Circuit's Divided Decision in Ho v. Greene, 204 F.3d 1045, Is Tenuous at Best and Does Not Warrant *Certiorari* Review at this Time.

The Tenth Circuit is presently in a posture to reconsider its opinion in Ho and thereby readily and effectively resolve any circuit conflict without the need for intervention by this Court. The Tenth Circuit was deprived of the opportunity to consider *en banc* its statutory holding in Ho because the case was dismissed for lack of jurisdiction in light of Mr. Ho's release from custody. 204 F.3d 1045, *pet. reh'g dismissed* (No. 98-1333) (10th Cir. June 2, 2000). Nevertheless, the Tenth Circuit is presently considering a motion for immediate *en banc* review of the analysis in the follow-up case to Ho, Vo v. Greene, 63 F.Supp.2d 1278, *appeal pending*, No. 99-1491 (10th Cir. 2000). In Vo, the district court granted Mr. Vo's writ of habeas corpus. 63 F.Supp.2d at 1284-85. Following the Tenth Circuit's decision in Ho, Mr. Vo immediately moved the Tenth Circuit for direct hearing *en banc*. As of the date of this pleading, Mr. Vo's petition for hearing *en banc* is under consideration by the Tenth Circuit.[17] Thus, the present conflict may be readily resolved (and dissipated) by the Tenth Circuit without intervention of this Court.

Even if the Tenth Circuit denies *en banc* review in Vo, *certiorari* review is not warranted here. As this Court has repeatedly held, the existence of a circuit split between two circuits does not in itself mandate *certiorari* review. See Metheny v. Hamby, 488 U.S. 913 (1988) (White, J., dissenting from denial of *certiorari*) (noting a number of cases in which Supreme Court denied

---

free of indefinite detention. Carrera-Valdez, 211 F.3d at 1047-48.

[17] There is one other appeal currently pending in the Tenth Circuit in which the individual ordered removed has asked the court to hold its consideration of the case in abeyance pending the resolution of the petition for hearing *en banc* in Vo. See Pril v. Greene, No. 99-1303 (D. Colo. 1999), *appeal docketed*, No. 99-1303 (10th Cir.).

review despite existing circuit splits); Sokol Bros. Co. v. Commissioner, 340 U.S. 952 (1951) (*certiorari* denied even though circuit split existed regarding proper construction of provision of the Internal Revenue Code).[18]

Furthermore, the Tenth Circuit rendered its decision before the court of appeals issued its opinion in this case, and therefore, could not benefit from the Ma court's exhaustive statutory analysis. Contrast App. A to Pet. for Cert. 8a-31a with Ho, 204 F.3d at 1056. The Ho majority erroneously interpreted the silence in § 1231(a)(6) as to any time limitation for post-final-order detention as an "express" authorization to the Attorney General "to indefinitely detain certain removable aliens." 204 F.3d at 1057. In so doing, the Tenth Circuit failed to appreciate (or even consider) the plain language of the statute, the evolution of post-final-order detention statutes, or prior case law interpreting analogous immigration laws. See App. A to Pet. for Cert. 24a-29a; see also, *infra*, pp. 26-31.

And the Ho panel rested its analysis on two clearly erroneous premises: First, that the indefinite detention of a deportable alien does not implicate a liberty interest, and, second, that a deportable person stands in the same constitutional footing as an excluded alien, i.e., an alien who has been denied entry at the border and is deemed "not to be present on the United States territory."[19] 204 F.3d at 1058-60. Thereby the Tenth Circuit failed to address or even consider

---

[18] The Court has previously let stand another circuit split with respect to prolonged detention by the INS. See, e.g., Marquez-Medina v. Meese, 475 U.S. 1022 (1986) (petition for *certiorari* from Garcia-Mir v. Smith, 766 F.2d 1478 (11th Cir. 1985), cert. denied, 475 U.S. 1022 (1985) (the split was with Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981)); see also Barrera-Echavarria v. Rison, 44 F.3d 1441 (9th Cir.) (en banc), cert. denied, 516 U.S. 976 (1995).

[19] Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 212-14 (1953) ("an alien on the threshold of initial entry stands on a different [constitutional] footing" than one who has

the guiding principle of constitutional avoidance. See Jones v. United States, -- U.S. --, 120 S.Ct. 1904, 1911 (2000) (applying Court's traditional constitutional avoidance doctrine); X-Citement Video, Inc., 513 U.S. at 78 (same); Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (same); United States v. Witkovich, 353 U.S. 194, 199 (1954) (same). See App. A to Pet. for Cert. 11a-24a.

First, the Ho majority's assumption that the indefinite detention of unremovable, deportable aliens implicates no protected liberty interest is contrary to well-established Supreme Court precedent concerning the Due Process rights of aliens admitted to the United States. See, e.g., Plyler v. Doe, 457 U.S. 202, 210-12 (1982) ("Whatever his status under the immigration laws, . . . [a]liens. . . have long been recognized as 'persons' guaranteed due process of law"); Wong Wing v. United States, 163 U.S. 228, 237-38 (1896) ("persons within the territory of the United States. . . and. . . even aliens. . . [may not] be deprived of life, liberty, or property without due process of law."); see also Mathews v. Diaz, 426 U.S. 67, 77 (1976); Landon v. Plasencia, 459 U.S. 21, 32 (1982); Kwong Hai Chew v. Colding, 344 U.S. 590, 597-98 (1953); App. A to Pet. for Cert. 18a & n.21.

Second, the Ho panel failed to recognize the long-standing distinction between aliens like Mr. Ma, who have been lawfully admitted to the United States and "excludable" aliens who, although physically present in the United States, are deemed to have been stopped at the border, seeking entry. See, e.g., Chew, 344 U.S. at 596-97 & 596 n.5 (right to remain may change but constitutional status -- which stems from the Constitution itself -- does not); Plasencia, 459 U.S. at 31 (recognizing distinction between constitutional status of alien "seeking initial admission" and "passed through our gates, even illegally.").

a deportable alien, who has gained admission and developed ties in the United States); see also App. A to Pet. for Cert. 13a-22a; Ho, 204 F.3d at 1061 (Brobry, J., dissenting) ("the majority's treatment of Petitioner's constitutional claims is supported only by a tenuous foundation of legal fiction stacked upon legal fiction.").[20]

Mr. Ma is not an alien standing at the border, seeking admission. He is a long-time resident alien of this country, who entered the United States long ago. The Ma court understood the import of this fact and thereby the substantial constitutional question raised by the Petitioners' construction of the ambiguous statute to permit the indefinite detention of an individual like Mr. Ma. See, *infra*, pp. 31-32; App. A to Pet. for Cert. 13a-23a; see also App. B to Pet. for Cert. 41a-42a. Although the Tenth Circuit did not have the benefit of the Ma court's extensive analysis in this regard when it rendered its decision in Ho, it now has the opportunity to reconsider its statutory analysis. Thus, any present conflict with the Tenth Circuit does not warrant *certiorari* review at this time.

II. *CERTIORARI* REVIEW IS PREMATURE BECAUSE THE STATUTORY ISSUE IS PRESENTLY PERCOLATING IN THE CIRCUIT COURTS OF APPEAL AND THE INS IS IN THE MIDST OF IMPLEMENTING REGULATIONS WHICH MAY ULTIMATELY REGULATE POST-FINAL ORDER DETENTION CONSISTENTLY WITH THE COURT OF APPEALS' DECISION IN MA.

In addition to the Tenth Circuit, appeals involving prolonged post-order detention are pending in two courts of appeals. See Cuesta-Martinez v. INS, 97 F.Supp.2d 647 (M.D. Pa 2000) (involving both statutory and constitutional questions raised by ongoing detention of deportable, but unremovable alien), *appeal docketed,* No. 00-1921 (3d Cir. 2000) (briefing

[20] For these same reasons, the Petitioners' reliance on the Fifth Circuit's faulty analysis is misplaced. App. A to Pet. for Cert. 13a-15a, 17a-21a & 20a n.23.

schedule received); Similien v. United States, *appeal docketed*, No. 98-2958 II (11th Cir. 2000); Taylor v. United States, *appeal docketed*, No. 99-12614-BB (11th Cir. 2000). The issue is also being considered by district courts in the Second, Third, Sixth, and Eighth Circuits. App. I, *infra*, 20a. Thus, even assuming any remaining conflict with the Tenth Circuit, granting *certiorari* at this time would be premature. See, e.g., McCray v. New York, 461 U.S. 961, 962-63 (1983) (Stevens, J., joined by Blackmun, J., and Powell, J., respecting denial of *certiorari*) (despite apparent importance of underlying issue, *certiorari* denied where issue required "further study" in lower courts "before it is addressed by this Court").

Moreover, in an apparent response to the Ma litigation, the INS has begun the process of revising its regulations governing post-final order detainees; these regulations implement the statutory mandate of 8 U.S.C. § 1231(a)(6), the statute which the Ma court construed. The process is currently in the comment stage. Pet. for Cert. 13 n.5 & 28. And Ma's standard of permitting detention for a reasonable time in order to effectuate deportation has undoubtedly been suggested by some commentators as a touchstone for the new regulations. Thus, as ultimately promulgated, the INS may adopt regulations implementing § 1231(a)(6) in a manner which recognizes in whole, or in part, the Ma court's holding that persons whose deportation orders cannot be effectuated should be released under an appropriate order of supervision.[21] In any event, to the extent the Petitioners' objections to the court of appeals' constitutional avoidance analysis is based upon the existence of a custody review process and any proposed regulations, Pet. for Cert. 26-29, a grant of a writ of *certiorari* while the relevant regulations are in transition

[21] If the proposed regulations as ultimately promulgated and implemented are consistent with Ma, the INS will likely concur in Mr. Ma's release under an order of supervision pending his deportation to Cambodia.

is premature. See Darr v. Burford, 339 U.S. 220, 227 (1950) (Frankfurter, J., dissenting) ("petitions may have been denied because, even though serious constitutional questions were raised, it seemed to at least six members of the Court that the issue was either not ripe enough or too moribund for adjudication; that the question had better await the perspective of time or that time would soon bury the question or, for one reason or another, it was desirable to wait and see").

In conclusion, the Petitioners' reliance on the present circuit split between the court of appeals in this case and the Tenth Circuit in Ho is misplaced, particularly where, as here, the Tenth Circuit is presently in a posture to reconsider its interpretation of the statutory claim in light of the exhaustive analysis in Ma; no other circuit has had the opportunity to fully consider the statutory issue; and the INS is in the process of revising its regulations governing post-final-order detention. Review by the Supreme Court at this time is not warranted. See, e.g., Darr v. Burford, 339 U.S. at 227 (Frankfurter, J., dissenting); Gilliard v. Mississippi, 464 U.S. 867 (1983) (Marshall, J., dissenting from denial of *certiorari*) (*certiorari* denied in case presenting constitutional questions regarding peremptory challenges where federal circuits had not yet "experimented with substantive and procedural solutions to the problem").

III. THE COURT OF APPEALS' CONSTRUCTION OF § 1231(a)(6) DOES NOT RESULT IN THE UNPRECEDENTED RELEASE OF CRIMINAL ALIENS.

Mr. Ma does not contest the fact that this case involves an important issue, namely, whether the court of appeals was correct in sustaining the validity of a federal statute. However, the Petitioners erroneously contend that the importance of this issue warrants *certiorari* review because the Ma decision results in the unprecedented release of individuals like Mr. Ma under an

order of supervision. Pet. for Cert. 15-16. The Petitioners are wrong.[22]

Far from the dire consequence that the Petitioners predict would result from the Ma decision, the Petitioners are still able to supervise Mr. Ma and others who benefit from this decision outside the prison walls and compel their appearances should the United States successfully negotiate the issuance of the requisite travel documents for each individual's deportation.[23] See 8 U.S.C. § 1231(a)(3); 8 C.F.R. § 241.5. Moreover, the district courts and the Ninth Circuit are considering each habeas corpus case individually, and are not, as implied by the Petitioners, summarily opening the INS's doors. App. J, *infra*, 21a-23a.

As noted by the court of appeals, with respect to concerns regarding flight risk or danger to the community, the Petitioners are not left without recourse should Mr. Ma or any other individual violate the terms of his supervision or commit another offense. App. A to Pet. for Cert. 32a & 33a n.31 (noting Mr. Ma can be detained and incarcerated if he engages in criminal activity and is subject to penalties, including incarceration of up to a year, for any willful violation of the

---

[22] The court of appeals' construction of the federal statute at issue is, as demonstrated below, clearly correct and avoids finding the statute unconstitutional. See, *infra*, pp. 26-38. And, as demonstrated above, *certiorari* review is premature. See, *supra*, pp. 15-22. Thus, even if "important," a writ of *certiorari* to consider the question presented in this case is not necessarily warranted. See, e.g., Carpenter v. Gomez, 516 U.S. 981 (1995) (Stevens, J., respecting denial of *certiorari*) ("Despite the importance of the constitutional question presented, I concur in the order denying the petition for writ of *certiorari*"); Battaglia et al. v. General Motors Corp., 169 F.2d 254 (2d Cir.), cert. denied, 335 U.S. 887 (1948) (refused to review cases sustaining validity of the Portal-to-Portal Act despite importance of question presented).

[23] While undersigned counsel was unable to find official statistics regarding the cost to Petitioners to incarcerate deportable aliens like Mr. Ma, an April 2000 report by the Federal Bureau of Prisons estimates expected costs of incarceration for one person at $1,807.06 per month ($21,684.67 annually), as compared to the cost of release under an order of supervision, which is estimated at $235.52 per month ($2,823.85 annually), per person. Federal Bureau of Prisons, *Memorandum to All Chief Probation Officers* (April 6, 2000) <http://156.119.80.10/courtoperations/fcsd/html/memos/fcsd00025.htm>.

order of supervision, citing to 8 U.S.C. § 1253(b)). And there is simply no evidence or reason to believe that the Petitioners' interests in protecting the community would not be "vindicated by the ordinary criminal processes involving the charge and the conviction, the use of enhanced sentences for recidivists, and other permissible ways of dealing with patterns of criminal conduct." See Foucha v. Louisiana, 504 U.S. 71, 82 (1992).

The Petitioners' inference that the Ma decision will lead to the unprecedented release of dangerous aliens is exaggerated in light of the relatively small number of aliens affected, all of whom have already been ordered released by the criminal justice system.[24] Despite this fact, the Petitioners have always contended that they had the authority to detain Mr. Ma based on his single criminal conviction, unsubstantiated speculation of present gang affiliation, and his participation in a hunger strike.[25] The record, however, demonstrates that these assertions are

---

[24] By the Petitioners' calculations, there are approximately 400 unremovable individuals ordered deported but presently incarcerated by the INS in the various states included in the Ninth Circuit. Pet. for Cert. 16. These individuals are only a small fraction of the more than 50,000 aliens ordered removed (the bulk of whom were apparently apprehended and prosecuted in the Ninth Circuit), and deported each year. See U.S. Dept. of Justice, Immigration and Naturalization Service, *1997 Statistical Yearbook of the Immigration and Naturalization Service*, 167 (1997).

[25] The Petitioners have "never suggested [Mr. Ma] is a flight risk" and the facts of this case belie any such suggestion. App. D to Pet. for Cert. 60a. For instance, he was released for eight days before the Supreme Court entered an interim order staying his release pending its consideration of the Petitioners application to stay his release. During that time, Mr. Ma reported to the INS, arranged for employment should the INS issue a work permit, and spent time with his family. On the morning Justice O'Connor entered the interim order, Mr. Ma voluntarily surrendered to INS custody. App. A to Pet. for Cert. 7a. Even when arrested for an alleged misdemeanor assault, Mr. Ma was released on bond, timely reported his arrest to the INS as required, and complied with all conditions of release.

nothing more than unjustified assumptions or conclusions.[26] Now, the Petitioners rely upon Mr. Ma's recent arrest for misdemeanor assault to suggest the court of appeals' decision resulted in the release of a dangerous alien. However, the Kent Municipal Court, which has the primary responsibility for protecting the public under these circumstances, ordered Mr. Ma released on bond and more importantly, dismissed the case with prejudice.[27] See, *supra*, p. 10 n.12. His release under an order of supervision is neither unprecedented nor inappropriate.

Further, as the Petitioners suggest, pursuant to the INS's own procedures, the INS is likely to release a large number of these detainees in any case. Pet. for Cert. 26-28. Indeed, prior to 1989, similarly situated individuals were automatically released after six months. And the history of post-final-order detention statutes, *infra*, pp. 28-31, underscores that those statutes have always favored release of persons ordered deported, with detention being the exception.

For all these reasons, the Ma decision does not result in the "unprecedented" release of criminal aliens. The issue does not warrant this Court's further consideration.

---

[26] For instance, there is no evidence that Mr. Ma is presently affiliated with a gang, or that he maintained any gang affiliations in his over four years in state and INS custody. To the contrary, as the district court specifically found, Mr. Ma's record contains "abundant information about [Mr. Ma's] relationships with his parents and siblings, employment prospects, and plans to avoid gang relations and criminal behavior, all of which oppose a finding of future dangerousness." App. D to Pet. for Cert. 60a n.3. Further, the only "behavioral" problem in his more than four years of custody was his participation in a hunger strike in 1997. App. A to Pet. for Cert. 7a. And while Mr. Ma has never contested the seriousness of the offense for which he was convicted, as found by the district court, it was not the intentional crime the Petitioners have always portrayed it to be. See, *supra*, p. 4-5 n.3.

[27] As both lower courts recognized, even assuming *arguendo* this arrest presents some indicia of *present* dangerousness, the government does not have the authority to punish Mr. Ma for this offense, U.S. Const. amend. V, nor does it enjoy the power to indefinitely detain a person based solely upon its prediction of future dangerousness. See Kansas v. Hendricks, 521 U.S. at 358.

IV. THE COURT OF APPEALS' INTERPRETATION OF § 1231(a)(6) IS ENTIRELY CONSISTENT WITH PRINCIPLES OF STATUTORY CONSTRUCTION AND SUPREME COURT PRECEDENT.

The principal argument advanced by the Petitioners to support the issuance of a writ of *certiorari* in this case is their contention that the Ma decision is erroneous. Pet. for Cert. 16-22, 26-29. For the reasons explained below, the decision of the court of appeals is plainly correct.

A. The Court of Appeals' Construction of § 1231(a)(6) Is Reasonable; Entirely Consonant with its Terms, Legislative History, and Statutory Evolution; and Appropriately Avoided a Substantial Constitutional Question Raised by Mr. Ma's Ongoing Detention.

The court of appeals did not rewrite an unambiguous statute. Pet. for Cert. 17. Instead, the court of appeals properly construed an *ambiguous* statute consistent with the court's obligation to avoid a substantial constitutional problem raised by the indefinite detention of a deportable but unremovable person. App. A to Pet. for Cert. 9a-22a; DeBartolo Corp., 485 U.S. at 575; accord Witkovich, 353 U.S. at 199 (rejecting government's contention that broad language of statute was unambiguous).

First, there is no merit to the Petitioners' contention that § 1231(a)(6) *expressly* authorizes the Attorney General to detain a deportable person like Mr. Ma without time limitation. The statute provides that certain aliens who cannot be removed by the end of the 90-day removal period "may be detained beyond the removal period[.]" 8 U.S.C. § 1231(a)(6); App. A to Pet. for Cert. 8a-9a. Nothing in this text expressly gives the INS the authority to detain indefinitely aliens who fall within this group of persons and who cannot be removed in the reasonably foreseeable future. App. A to Pet. for Cert. 9a & 25a ("To sustain the INS' indefinite detention theory we would be required to read far more into the statute than its language implies."). Rather, on its

face, the statute provides for detention beyond the 90-day removal period but is *silent* about how long beyond that period the Attorney General may detain a person ordered deported, particularly where deportation is not reasonably foreseeable. App. A to Pet. for Cert. 9a.

Nor does the statute's lack of an express time limit on the detention of deportable aliens constitute an *implicit* authorization for indefinite detention. Rather, as the court of appeals explained: "We cannot presume that Congress would authorize so drastic a limitation on the rights of such aliens by so indirect a means, particularly when it could have easily included express language to that effect in the statute." App. A to Pet. for Cert. 24a-26a; see also id. at 24a n.25 (noting that "Congress is familiar with time limitations in the detention and removal context and could easily have authorized detention 'without limitation' or 'indefinitely' if it so desired." (citing 8 U.S.C. §§ 1231(a)(1)(A), (a)(1)(C), (b)(2)(C), (b)(2)(D), (c)(3)(A) and (c)(3)(B), as all "specifying various time periods in detention and removal context.")).

Second, the court of appeals' construction of the statute is reasonable and entirely consonant with its legislative history and statutory evolution. The court of appeals' interpretation of statutory silence as authorizing post-final-order detention for only a reasonable period of time is consistent with a long line of precedent. App. A to Pet. for Cert. 26a-29a (discussing case law interpreting pre-1952 immigration statute as authorizing detention only for a "reasonable period" of time to effectuate removal, noting that these cases support "the principle that, when faced with the absence of an express time limitation, courts should ordinarily not assume that Congress intended a result as harsh and constitutionally dubious as indefinite detention."). Far from substituting its legislative preference for that of Congress, the court of appeals, by interpreting the statute as authorizing detention beyond the removal period for only a "reasonable time" to

effectuate deportation, simply applied the same principles of statutory construction uniformly adopted by courts that have construed prior immigration detention statutes.

The Petitioners incorrectly argue that the statutory evolution of § 1231(a)(6) expresses a congressional intent to authorize indefinite post-final order detention of unremovable aliens. Pet. for Cert. 19-21. Close consideration of the statutory evolution of immigration law in this area demonstrates that the Petitioners' construction -- which for the first time *assumes* Congress intended to permit the INS to "hold people in detention for the remainder of their lives," App. A to Pet. for Cert. 24a -- is the "significant departure from past law." Pet. for Cert. 17. Accord App. A to Pet. for Cert. 24a-25a n.25 (Congress made no such express statement).

Before 1952, the Immigration Act set no express time limit on the post-final-order detention of deportable aliens. App. K, *infra*, 25a-26a. Then, in 1952, Congress imposed a six-month limitation on the post-final-order detention of deportable aliens. See *former* 8 U.S.C. § 1252(c) (1952) (requiring release under supervision of any deportable alien whose deportation could not be effectuated within six months) (reprinted at App. L, *infra*, 27a).[28] This six-month rule (which prohibited the INS from detaining an individual beyond that point in time) remained in effect for all deportable aliens until 1990, when Congress amended the statute to bar the release of any alien with an aggravated felony conviction, with limited exceptions. See *former* 8 U.S.C. §§ 1252(a)(2)(A) & (B) (1991) ("the Attorney General shall not release [alien with aggravated felony

---

[28] Federal courts strictly interpreted the six-month time limit contained in the 1952 statute as prohibiting any detention of deportable aliens beyond six months. See, e.g., Oguachuba v. INS, 706 F.2d 93, 96 (2d Cir. 1983); Johns v. Dep't of Justice, 653 F.2d 884, 890 (5th Cir. 1981); Castillo-Gradis v. Turnage, 752 F.Supp. 937, 941 (S.D. Cal. 1990).

conviction] from custody.") (reprinted at App. M, *infra*, 28a-29a).[29]

However, when Congress enacted § 1231(a)(6) in 1996, it repealed the mandatory language in the prior statute, which prohibited the release of deportable aliens with aggravated felony convictions, and replaced it with the permissive language of § 1231(a), which granted the discretionary authority to release these individuals or detain them beyond the 90-day period. Compare 8 U.S.C. § 1231(a)(6) (1996) (alien "may be detained beyond the removal period") with *former* 8 U.S.C. § 1252(a)(2)(B) (1991) ("shall not release"); see also App. A to Pet. for Cert. 24a n.25 (noting that two custody provisions that succeeded the 1995 version of the law, §440(c) of Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and § 303(b)(3) of IIRIRA, expressly prohibited release but Congress did not use that same language in § 1231(a)(6), which was enacted simultaneously therewith).[30] The language used by Congress in the previous post-order detention statutes is stronger and absolutely prohibits release from detention. Id. By contrast, § 1231(a)(6) is silent about the duration of the Petitioners' authority to detain a deportable alien after entry of a final order. In light of the repeal of the mandatory language of the pre-1996 statute, together with the more permissive language implemented by Congress in the

---

[29] By adding this mandatory language in 1990, Congress for the first time provided a statutory basis for the INS to detain a limited group of deportable aliens beyond a six-month period to effectuate removal. See *former* 8 U.S.C. §§ 1252(a)(2)(A) & (B) (1991) ("Notwithstanding . . . [the six-month rule] the Attorney General shall not release. . . from custody" an alien convicted of an aggravated felony, unless the alien has been "lawfully admitted for permanent residence" and "the Attorney General determines that the alien is not [a danger or flight risk]."). App. A to Pet. for Cert. 24a & n.25.

[30] Congress also shortened the time period within which the INS must execute deportation from 6 months to 90 days, which is entirely consistent with the prior case law imposing a reasonable time of anywhere from two to four months and the greater time period of 6 months in the previous statute, *former* 8 U.S.C. § 1252(c), considered reasonable so long as deportation was reasonably foreseeable. See, *infra*, p. 30; App. A to Pet. for Cert. 26a-29a.

current version of the statute, it cannot be said that Congress has now manifested a clear intent to authorize the indefinite, and potentially permanent, detention of deportable aliens who cannot be removed. Indeed, nowhere in the legislative history of § 1231(a)(6) is there any discussion or stated approval for the indefinite detention of deportable aliens beyond the 90-day removal period.

Moreover, the court of appeals' interpretation of § 1231(a)(6) as containing a reasonable time limitation is entirely consistent with earlier courts' interpretation of the pre-1952 detention statute which, like § 1231(a)(6), was silent as to the duration permitted for post-order deportation detention. App. K, *infra.*, 26a; App. A to Pet. for Cert. 26a-29a (citing to Wolck v. Weedin, 58 F.2d 928, 931 (9th Cir. 1932) (government given 30 days to implement deportation); Saksagansky v. Weedin, 53 F.2d 13, 16 (9th Cir. 1931) (petitioner must be released if cannot be deported within 30 days); Caranica v. Nagle, 28 F.2d 955, 957 (9th Cir. 1928) (two-month deadline to effectuate deportation not an abuse of discretion); and United States ex rel Ross v. Wallis, 279 F. 401, 404 (2d Cir. 1922) (imposed "reasonable" time limit of four months)). See also Petition of Brooks, 5 F.2d 238, 239-40 (D. Mass. 1925) (held alien was "entitled to be deported, or to have his freedom"). In light of this past law and the consistent adherence to a reasonable time limit for detention pending removal, the court of appeals therefore reasonably interpreted the statute as providing that the general time period for effectuating deportation is now 90 days (less than the pre-1996 six-month period), but allowing for flexibility for those cases requiring "a reasonable extension of time when circumstances render an additional period necessary in order to accomplish the statutory purpose -- the removal of the alien." App. A to Pet. for Cert. 25a.

The court of appeals' construction of § 1231(a)(6) is also consistent with the overall structure of the provisions that have historically governed the detention of deportable aliens like Mr. Ma: release from detention being traditionally the rule, and detention the exception. App. A to Pet. for Cert. 17a n.20. Immigration law history of deportable aliens contains no mention of prolonged detention. Quite to the contrary, as explained above, from 1952 until 1990, the INS was prohibited from detaining any deportable aliens for more than six months after the entry of a final order. Contrast Barrera-Echavarria v. Rison, 44 F.3d 1441, 1447 (9th Cir.) (en banc), cert. denied, 116 S.Ct. 479 (1995) (detention for excludable aliens the norm, release the exception and "Congress has for at least four decades been aware of instances of long-term detention of excludable aliens by the executive branch.").

Finally, the court of appeals' construction avoided a substantial constitutional question raised by Mr. Ma's ongoing detention. The court of appeals' finding of a significant constitutional problem raised by the Petitioners' construction of the statute is consistent with long-standing Supreme Court precedent recognizing the Due Process rights of deportable aliens. See, e.g., Plyler, 457 U.S. at 210-12 (the Fifth Amendment applies to all persons within the territorial jurisdiction of the United States). In suggesting that the court of appeals' decision somehow conflicts with Supreme Court precedent, the Petitioners erroneously equate Mr. Ma who, following inspection by the INS, lawfully entered this country long ago, with an alien who has been stopped at the border and denied entry. There is no authority for the Petitioners' assumption that Mr. Ma should be treated like an alien at the border seeking entry. App. A to Pet. for Cert. 13a-22a. And, as the court of appeals recognized, that assumption flies in the face of Supreme Court precedent recognizing that deportable aliens have constitutional rights

concomitant with their ties to this country. Id.; see also Plasencia, 459 U.S. at 32 ("once an alien gains admission to our country and begins to develop the ties that go with permanent residence his constitutional status changes accordingly."); Wong Wing, 163 U.S. at 238; Yick Wo v. Hopkins, 118 U.S. 356, 359 (1886).

In its adherence to these well-established principles, the court of appeals correctly recognized the serious constitutional problem presented by Mr. Ma's ongoing detention based on an order of deportation that the INS is unable to execute. And in so doing, the court of appeals properly avoided that substantial constitutional question by interpreting the statute as permitting detention for a reasonable time period to effectuate deportation. App. A to Pet. for Cert. 11a-13a, 23a-24a (citing to, in part, Witkovich, 353 U.S. at 199).

B. The Release of Individuals like Mr. Ma Does Not Impermissibly Intrude on Executive Branch Functions.

The indefinite detention of Mr. Ma, who entered this country long ago as a refugee, does not implicate the sovereignty and foreign policy concerns suggested by the Petitioners. Pet. for Cert. 29. Contrary to the concerns which informed this Court's decision in Carlson v. Landon, 342 U.S. 524, 534-36 (1952), and Mathews v. Diaz, 426 U.S. at 81, the indefinite detention of Mr. Ma does not affect the ability of Congress to classify aliens for admission or deportation. Nor does releasing an already admitted alien have any effect on the Petitioners' ability to continue negotiations with the foreign state for the issuance of requisite travel documents or necessary repatriation agreements. As the Petitioners concede, the government's efforts to engage in negotiations with Cambodia have continued despite the release of Mr. Ma and other former nationals of Cambodia. Pet. for Cert. 17 n.10. There is simply no evidence that Cambodia will

discontinue negotiations if Mr. Ma remains released from INS custody, or that the United States is disadvantaged in those negotiations because of his release.[31]

The Petitioners also erroneously suggest that the application of the facts of Mr. Ma's case to the legal holding implies that the Executive Branch believes its negotiations with Cambodia are "futile." Pet. for Cert. 30. Nothing in the court of appeals' decision supports such a view. App. A to Pet. for Cert. 25a, 32a & n.30. The court of appeals did not second-guess the Petitioners' evidence. Rather, taking that evidence at face value, the court of appeals found that the district court correctly concluded that a repatriation agreement is necessary to deport Mr. Ma to Cambodia, and no such agreement or arrangement currently exists. App. A to Pet. for Cert. 32a & n.30. Even if one did exist, there is no evidence that Mr. Ma's deportation would readily follow. App. D to Pet. for Cert. 58a-59a; App. E, *infra*, 9a-11a; App. F, *infra*, 12a.

C. The Court of Appeals Properly Reviewed Mr. Ma's Statutory Claim Under the Constitutional Avoidance Doctrine and Not, as Suggested by the Petitioners, A More Deferential Standard of Review.

The Petitioners' argument further rests on the erroneous assumption that the Attorney General's interpretation of § 1231(a)(6) is entitled to substantial deference under Chevron U.S.A. v. NRDC, 467 U.S. 837 (1984), Pet. for Cert. 18 (citing to INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999)), as well as under the plenary power doctrine. Pet. for Cert. 29-30.

First, Aguirre-Aguirre did not involve a constitutional question, but instead dealt with the INS's interpretation of the specific statutory term "serious political crime" (8 U.S.C.

[31] As noted by the Petitioners, Congress has provided a way to deal with recalcitrant countries unrelated to the detention or release of the deported individual. Pet. for Cert. 17 n.13 (Congress authorized the Executive to discontinue issuance of visas as a way to pressure recalcitrant countries to negotiate return of aliens ordered deported).

§1253(h)(2)(C)) in deciding whether an applicant was eligible for political asylum. 526 U.S. at 425. This is the type of technical application of a statutory scheme to which Chevron deference applies. Id. In contrast, the Petitioners' construction of § 1231(a)(6) -- which would permit the indefinite detention of a long-time permanent resident even though his deportation order cannot be effectuated -- poses serious questions regarding the validity of that same provision under the Fifth Amendment. Under these circumstances, as this Court concluded in DeBartolo Corp., 485 U.S. 568, the canon of constitutional avoidance is applicable; Chevron principles of deference are not. 485 U.S. at 575; see also Rust v. Sullivan, 500 U.S. 173, 190-91 (1991), App. A to Pet. for Cert. 9a-10a n.13.

Second, Mr. Ma's claim is not insulated from judicial scrutiny simply because it involves immigration. The Petitioners' suggestion that the court of appeals' analysis is inconsistent with the Attorney General's "plenary power" in immigration matters fails to recognize that the doctrine of constitutional avoidance applies with equal force in immigration cases, as it would in any other matter. See, e.g., Witkovich, 353 U.S. at 199.

Moreover, deference under the plenary power doctrine does not apply in all immigration contexts but is limited to substantive immigration decisions or matters of immigration policy where the political branch is operating within constitutional limits, e.g., which classes of aliens are admissible or deportable. See, e.g., Fiallo v. Bell, 430 U.S. 787, 794-95 (1977) (upheld a section of INA of 1952 which set forth circumstances under which an alien child could immigrate to the United States); and Kleindienst v. Mandel, 408 U.S. 753, 765 (1972) (upheld Attorney General's discretion to deny a waiver to allow an entry visa to a Marxist professor from Belgium who had violated the restrictions on his visa during an earlier visit). In contrast, the doctrine has

considerably less force in other contexts. See, e.g., INS v. Chadha, 462 U.S. 919, 940-41 (1983) (refused to apply deferential standard in considering validity of statutory scheme that violated the bicameral requirement and presentment clauses of Article I of the Constitution); Hampton v. Mow Sun Wong, 426 U.S. 88, 99-101 (1976) (same in considering the validity of federal regulation promulgated by Civil Service Commission that excluded aliens from most federal government employment); Wong Wing, 163 U.S. at 237 (same in considering validity of punishment of hard labor post-deportation).

Here, Mr. Ma does not challenge the Attorney General's determination that he should be deported or, in other words, Congress' power to determine who is entitled to enter or remain in the United States. The only issue is whether one of the *means* by which Congress has chosen to implement its immigration power -- detention pending removal -- is statutorily authorized and comports with due process. The *means* by which Congress chooses to implement substantive immigration decisions are subject to constitutional restraints; Congress may not exercise its power in a way which violates the Constitution. See Chadha, 462 U.S. at 940-41 ("The plenary authority of Congress over aliens. . . is not open to question, but what is challenged here is whether Congress has chosen a constitutionally permissible means of implementing that power."); see also Fiallo, 430 U.S. at 792-93 n.4 ("Policies pertaining to the entry of aliens and their right to remain here are peculiarly concerned with the political conduct of the government. In the enforcement of these policies, the Executive Branch of the Government must respect the procedural safeguards of due process[.]").[32]

---

[32] For these reasons, the Petitioners' reliance on Carlson v. Landon, 342 U.S. 524 (1952), is misplaced as that decision dealt with the validity of detention without bond of an alleged Communist *pending deportation proceedings*. 342 U.S. at 526-28; see also United States v. Witkovich, 353 U.S. 194, 201 (1957) (Carlson did not involve the issue of whether an alien can be detained after entry of removal order that cannot be executed). Similarly, their reliance on Mathews v. Diaz, 426 U.S. 67 (1976), and Harisiades v. Shaughnessy, 342 U.S. 580 (1952), is misplaced as each of these cases involved either the power to deport or expel aliens, or the terms of their residency. Mathews v. Diaz, 426 U.S. at 69-70 (whether petitioner entitled to federal medical benefits which were conditioned on length of residency); Harisiades v. Shaughnessy, 342 U.S. at 581 (whether resident alien may be ordered deported because of membership in Communist party). And in Aguirre-Aguirre, 526 U.S. 415 (1999), the Court dealt with the unrelated issue of immigration classifications and its effects. 526 U.S. at 418.

Consistent with these well-established principles, the court of appeals concluded that, whatever application plenary power deference may have had in other cases, "the plenary power doctrine does not apply in the same way to each case to which it is relevant, and that its exercise is subject to constitutional restraint." App. A to Pet. for Cert. 21a n.24. The circuit court, accordingly, construed the statute in a manner consistent with ordinary tenets of statutory construction and the well-established doctrine of constitutional avoidance.

D. The Fact of Any Ongoing Negotiations with Cambodia Does Not Warrant a Writ of *Certiorari*.[33]

The Petitioners' submission of the latest information regarding the government's ongoing

[33] The Petitioners rely upon a purported "joint statement" which has been previously filed in related habeas corpus cases as an exhibit to the most recent State Department declaration dated May 5, 2000, and executed by James Hergen, Legal Adviser for East Asian affairs, to support its request for *certiorari* review and contention that the court of appeals decision is wrong. Pet. for Cert. 16 n.9 & 17 n.10. The complete Hergen Declaration and attached exhibits are lodged in its entirety as an exhibit to Mr. Ma's Response to the Petitioners' Lodged Document filed simultaneously herewith.

Mr. Ma does not waive any evidentiary objections that may be made with respect to the receipt of the purported "joint statement," nor has the government supplied the Court or the parties with any information necessary to determine whether judicial notice is appropriate. See Fed. R. Evid. 201. Moreover, Mr. Ma objects to the Petitioners' belated attempt to expand the scope of the record without permission of the Court, and without first seeking leave of the district court to modify its release order of Mr. Ma based upon this purportedly new evidence. S. Ct. Rule 26 (limiting content of Appendix to the record); Fed. R. App. P. 10 (defining the record on appeal).

negotiations with Cambodia does not affect the court of appeals' legal holding that the statute does not authorize detention when deportation is not reasonably foreseeable. It relates solely to the court of appeals' conclusion regarding the application of that holding to Mr. Ma's case -- specifically, to whether Mr. Ma's removal to Cambodia is reasonably foreseeable. Thus, even if this Court concludes that the government's "new" information might affect the application of the court of appeals' holding to the facts of Mr. Ma's case (which it does not, see, *infra*, p. 39 n.34), that finding is insufficient to warrant a writ for *certiorari*. See United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant *certiorari* to review evidence and discuss specific facts.") (cited with approval in Texas v. Mead, 465 U.S. 1041, 1043 (1984) (Stevens, J., respecting denial of *certiorari*); see also Russell v. Southard, 53 U.S. 139, 159 (1851) ("This court must affirm or reverse upon the case as it appears in the record."); accord Fed. Rule App. P. 23 (defining proper means to seek modification of release order).[34]

///

---

[34] Even if the Supreme Court considers this new information properly before the Court and relevant to its consideration of the Petitioners' petition for *certiorari*, this information does not compel a result contrary to that reached by the court of appeals: Mr. Ma's deportation is not reasonably foreseeable.

Today, as it was before the district court and the court of appeals, there is no *functioning* informal or formal agreement pursuant to which Mr. Ma will be deported. And a close consideration of Mr. Hergen's declaration demonstrates (as the evidence before the district court and the court of appeals also demonstrated) that the government is still unable to predict with any certainty when, if ever, "a repatriation agreement [or arrangement] will be established and begin to function." App. A to Pet. for Cert. 32a & n.30. See, e.g., Ex. A to Response to Lodged Document (May 5, 2000, Hergen Declaration) at 3 ¶¶ 11-12, 14-16) (continuing negotiations do "not, to be sure, mean that such arrangements are imminent, or that they will result in the immediate repatriation of all nationals of all the states [Cambodia, Laos, and Vietnam] who are currently detained in the U.S. under final order of deportation, exclusion, or removal."). Moreover, there is no evidence that, even assuming *arguendo* an agreement was reached, that Mr. Ma's removal will readily follow.

The court of appeals correctly held that Mr. Ma's deportation is not reasonably foreseeable, and that, therefore, his detention is not statutorily authorized. The circuit court reached this conclusion based upon its consideration of this Court's prior decisions, and well-established rules of statutory construction. The Petitioners' disagreement with the court of appeals' interpretation of § 1231(a)(6) does not warrant further consideration.

CONCLUSION

For these reasons, review of the question presented is not appropriate and the Petitioners' petition for *certiorari* should be denied.

Respectfully submitted,

Jennifer E. Wellman
Staff Attorney

Jay W. Stansell
Assistant Federal Public Defender
Counsel of Record

Thomas W. Hillier, II
Federal Public Defender for the
Western District of Washington

Counsel for Respondent, Kim Ho Ma

August 31, 2000

No. 00-38

In The Supreme Court of the United States

JANET RENO, Attorney General of the United States; ROBERT S. COLEMAN, JR., District Director of the Immigration and Naturalization Service, Seattle; and the UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, PETITIONERS

v.

KIM HO MA, RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO BRIEF IN OPPOSITION

THOMAS W. HILLIER, II
Federal Public Defender
for the Western District of Washington

JAY W. STANSELL
Assistant Federal Public Defender
Counsel of Record

JENNIFER E. WELLMAN
Staff Attorney

1111 Third Avenue, Suite 1100
Seattle, Washington 98101
(206) 553-1100
Counsel for Respondent

APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KIM HO MA, Plaintiff, v. JANET RENO, Attorney General; UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, and RICHARD SMITH, District Director, Seattle District, Defendants.	)	Case No. 99-151L STAY ORDER

The Court's order granting petitioner the writ of habeas corpus, entered in this matter today, is hereby STAYED pending further order of the Court.

The Clerk of the Court is directed to send copies of this order to all counsel of record and to the Assistant District Director for Deportation for the Immigration and Naturalization Service (815 Airport Way South, Seattle, Washington, 98134, facsimile (206) 553-2387).

DATED this 29th day of September, 1999.

/s/ Robert S. Lasnik
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KIM HO MA,	)	Case No. 99-151L
	)	
Plaintiff,	)	ORDER
	)	
v.	)	
	)	
JANET RENO, Attorney General; UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE, and RICHARD SMITH, District Director, Seattle District,	)	
	)	
Defendants.	)	

The Court entered an order granting petitioner the writ of habeas corpus, and the government requested a stay pending appeal. Having considered petitioner's response and the government's reply, the Court finds a stay is not warranted. The government may have up to seven days within which to request a stay from the Court of Appeals before this Court's order must be executed.

Federal Rule of Appellate Procedure 23(c) requires release of a prisoner who has obtained the writ of habeas corpus unless a court specifically directs otherwise. This establishes a presumption in favor of release. Hilton v. Braunskill, 481 U.S. 770, 777 (1987). When the government seeks a stay, the court should consider the factors ordinarily applied in a civil case. Id. Those include:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be

> irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. at 776. After consideration of these factors, the Court determines that the government has not met its burden to justify granting the stay pending appeal.

Because there have been two decisions by circuit courts that support the government's position on appeal in this matter, the Court will allow the government up to seven days to obtain a stay from the Court of Appeals. When that Court decides the government's application for a stay, or on October 7, 1999, whichever is sooner, petitioner must be released, unless the Court of Appeals orders otherwise.

The Clerk of the Court is directed to send copies of this order to all counsel of record and to the Assistant District Director for Deportation for the Immigration and Naturalization Service (815 Airport Way South, Seattle, Washington, 98134, facsimile (206) 553-2387).

DATED this 30th day of September, 1999.

/s/ Robert S. Lasnik
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KIM HO MA,	)	No. 99-35976
	)	
Petitioner-Appellee,	)	DC# CV-99-151-RSL
	)	Western Washington
v.	)	(Seattle)
	)	
IMMIGRATION AND	)	ORDER
NATURALIZATION SERVICE,	)	
et al.,	)	
	)	
Respondents-Appellants.	)	

Before: WALLACE, Circuit Judge

The court, on its own motion, stays the district court's order releasing petitioner, Kim Ho Ma, pending full consideration of the emergency motion for stay pending appeal filed on October 6, 1999.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KIM HO MA,	)	No. 99-35976
	)	
Petitioner-Appellee,	)	DC# CV-99-151-RSL
	)	Western Washington
v.	)	(Seattle)
	)	
IMMIGRATION AND	)	ORDER
NATURALIZATION SERVICE,	)	
et al.,	)	
	)	
Respondents-Appellants.	)	

Before: WALLACE and LEAVY, Circuit Judges

Appellants emergency motion for a stay pending appeal is denied. Petitioner shall be released subject to appropriate conditions before 5:00 p.m. on Monday, October 25, 1999.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KIM HO MA, Petitioner-Appellee, v. IMMIGRATION AND NATURALIZATION SERVICE, et al., Respondents-Appellants.	)	No. 99-35976 DC# CV-99-151-RSL Western Washington (Seattle) ORDER

Before: BROWNING and WALLACE, Circuit Judges

Respondent's emergency motion to stay petitioner's release pending the filing and consideration of an emergency motion for a stay in the United States Supreme Court is denied.

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. 99A359

JANET RENO, ATTORNEY GENERAL, ET AL.,

Applicants,

v.

KIM HO MA

ORDER

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the enforcement of the order of the United States District Court for the Western District of Washington, case No. C99-151L, filed September 29, 1999, is hereby stayed pending receipt of a response, due on or before November 9, 1999, and further order of the undersigned or of the Court.

/s/ Sandra D. O'Connor
Associate Justice of the Supreme Court
of the United States

Dated this 2nd day of November, 1999

120 S.Ct. 466 (Mem)
145 L.Ed.2d 379, 68 USLW 3351
(Cite as: 120 S.Ct. 466)

Supreme Court of the United States

Janet RENO, Attorney General, et al.,
applicants,

v.

KIM HO MA.

No. 99A359.

Nov. 12, 1999.

Application for stay presented Justice O'CONNOR and by her referred to the Court

denied.

NOVEMBER 12, 1999 ORDER

APPENDIX E

JUDGE ROBERT S. LASNIK
MAGISTRATE JUDGE JOHN L. WEINBERG

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KIM HO MA, Petitioner, v. JANET RENO; UNITED STATES IMMIGRATION AND NATURALIZATION SERVICE; and RICHARD SMITH, Respondents.	NO. C 99-151L AFFIDAVIT OF NUALA NI MHUIRCHEARTAIGH

STATE OF WASHINGTON)
:ss
COUNTY OF KING)

I, Nuala Ni Mhuircheartaigh, being duly sworn and upon my oath, depose and say:

1. I am currently engaged as the Thomas Addis Emmett International Fellow at the Federal Public Defender's Office in Seattle, WA, where I am assisting Jay Stansell, Assistant Federal Public Defender, and Jennifer Wellman, Staff Attorney, in their representation of Mr Kim Ho Ma. The statements in this declaration are based on my direct knowledge and a series of telephone conversations with the Consulate General of Cambodia in Washington, D.C.

2. On Wednesday, July 21, 1999, I engaged in a telephone conversation with the Cambodian

Consul Mr. Nou Hak at the Consulate General of Cambodia in Washington, DC. The purpose of this conversation was to ascertain whether any possibility existed of Cambodia issuing travel documentation for Mr. Ma and allowing his deportation to that State.

3. To this end I informed Mr. Hak of the relevant aspects of Mr. Ma's history as revealed by his INS A-file, including but not limited to, the nationality of his parents, his place and date of birth, his criminal conviction while a Permanent Resident of the United States, and the Final Order of Deportation to which he is now subject.

4. Mr. Hak informed me that no possibility existed of issuance of travel documentation to Mr. Ma or any other Cambodian national, because at present, there is no formal deportation agreement between the United States and Cambodia. The Cambodian government has only one international deportation agreement, with Thailand, and as a result, all requests from all other countries for travel documents for Cambodian nationals who have been ordered deported, are refused. Mr. Hak confirmed in this regard, that he was not aware of any successful deportation to Cambodia from the United States.

5. On Thursday, September 9, 1999, I engaged in a follow-up conversation with Mr. Hak concerning the specific case of Mr. Kim Ho Ma. Mr. Hak again confirmed that at present no agreement is in place between the governments of Cambodia and the United States, and that as a result, the deportation of Mr. Ma to Cambodia is at present not possible. Mr. Ma must be processed under United States law, he stated.

6. Mr. Hak also informed me that on Saturday, September 4, 1999, officials of the United States State Department met with officials of the Cambodian Consulate with regard to the State

Department's preliminary proposals for a deportation agreement between the two states. Mr. Hak confirmed, however, that the Cambodian Government and Consulate made no input with regard to the proposal in question. Officials of the Consulate, he stated, will now send a report of the meeting and State Department proposals to the Cambodian Government for comment. Mr. Hak stated, however, that he cannot foretell how much time will pass before the Cambodian Government will pass preliminary comment on the United States State Department proposals. He further stated that he cannot foresee when any possible agreement will be concluded, if indeed such an agreement is ever reached. No definite time can be stated, he emphasized, when a deportation agreement between the United States and Cambodia may be completed.

7. The situation thus remains as heretofore, Mr. Hak repeated: at present, no possibility of authorization of removal of Mr. Ma from the United States to Cambodia exists, and further, he cannot predict when, if ever, such authorization will be forthcoming.

The foregoing is true and correct to the best of my knowledge, information and belief.

DATED this 9th day of September, 1999.

/s/ Nuala Ni Mhuircheartaigh

[seal] SUBSCRIBED and SWORN to before me this 9th day of September, 1999.
/s/ Karen A. Crawford
NOTARY PUBLIC in and for the State of Washington, residing at Issaquah
My appointment expires 7/19/02

APPENDIX F

[seal]
NATION - RELIGION - KING

KINGDOM OF CAMBODIA
Royal Embassy of Cambodia
to the United States of America
Washington, D.C.

July 27, 1999

Mr. Jay W. Stansell
Assistant Federal Public Defender
Western District of Washington

Dear Mr. Stansell,

I have the honor to acknowledge receipt of your letter date July 26, 1999, regarding the Travel Document of former Cambodia citizen to deport from United States to Cambodia. I would like to inform you that the Royal Government of Cambodia has no extradition treaty with the United States. Therefore, subject must be detained under the laws of the United States.

Please accept the assurances of my high consideration.

Sincerely,

/s/
Nou Hak
First Secretary and Consul

4500 16th Street, N.W. Washington, D.C. 20011 Tel: (202) 726-7742 Fax: (202) 726-8381
Web Page: http://www.embassy.org.cambodia
Email: cambodia@embassy.org

APPENDIX G

JUDGE ROBERT S. LASNIK

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KIM HO MA, Plaintiff, v. IMMIGRATION AND NATURALIZATION SERVICE, Defendant.	NO. C 99-0151WD AMENDED PETITION FOR WRIT OF HABEAS CORPUS BY A PERSON IN FEDERAL CUSTODY PURSUANT TO 28 U.S.C. § 2241

1. Name and location of place of confinement:[1]

King County Correctional Facility, Regional Justice Center Kent, 620 West James Street, Kent, Washington 98032, pursuant to a contractual arrangement with petitioner's custodian, the INS District Director at Seattle, Washington.

2. Name and location of court causing confinement:

INS District Director, Seattle, Washington.

3. Case Name and Number: A 27 365 395

4. Date of judgment of conviction:
Placed in INS detention on June 6, 1997; petitioner was ordered deported in September of 1997; petitioner appealed his deportation order to the BIA, which denied his appeal in October of

[1] This petition substantially conforms to the Model Forms for petitions under 28 U.S.C. § 2241.

FEDERAL PUBLIC DEFENDER
1111 Third Avenue, Suite 1100
Seattle, Washington 98101
(206) 553-1100

1998.

5. Sentencing Date: N/A

6. Sentence: N/A

7. Sentencing Judge: N/A

8. Nature of offense or offenses for which you were convicted: N/A

9. What was your plea: N/A

10. Kind of trial: N/A

11. Did you testify at trial? N/A

12. Did you appeal from the judgment of conviction or sentence? No.

13. If you did appeal, list the court to which you appealed:

(a) Name of Court:

(b) Result:

(c) Date of Result:

14. Did you seek any further review? N/A

15. List the court(s) to which you sought further review?

(a) Name of Court:

(b) Nature of Review:

(c) Result:

16. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to your confinement in any court, state or federal?

FEDERAL PUBLIC DEFENDER
1111 Third Avenue, Suite 1100
Seattle, Washington 98101
(206) 553-1100

Subsequent to this petition, petitioner filed a Petition for Writ of Habeas Corpus by a Person in Federal Custody Pursuant to 28 U.S.C. §2241 (Case No. C99-0337C, U.S. Dist. Ct., W.D. Wa.)

17. GROUNDS FOR RELIEF:

A. Petitioner's indefinite detention by respondent INS is in violation of his rights to procedural and substantive due process, as guaranteed by the Fifth Amendment to the United States Constitution.

B. Because petitioner is seeking relief related only to his custody status, which is not inconsistent with an order of deportation, exhaustion of administrative remedies, if any, is not required.

C. Petitioner's detention is unconstitutional, because he is not a flight risk, and he does not present a danger to society.

17a. Facts in support of grounds for relief as set forth in §17:

A. Petitioner is subject to an order of deportation, not incarceration, however he is being deprived of personal liberty indefinitely because Cambodia, his native country, refuses to accept his return.

B. Petitioner has asked the Immigration Judge for release to community supervision, and has been denied bail three times. Petitioner went on a hunger strike to bring attention to his unlawful detention, but the INS did nothing.

Petitioner should not be required to exhaust administrative remedies (if any such remedies are actually available) relating to the underlying order for deportation in order to be released from his indefinite incarceration, which violates his constitutional rights.

C. Petitioner has many family members who would support him if he were released. He has a good job waiting for him and a place to live in a safe environment. Petitioner would make a positive contribution to society if he were released.

Although the INS is holding petitioner because it believes he is a danger to the community or a flight risk, or both, it is not giving him any access to educational, rehabilitative or vocational programs. Petitioner is therefore not being given any chance to prove his rehabilitation.

D. Petitioner filed the instant *pro se* petition on February 2, 1999. The Federal Public

FEDERAL PUBLIC DEFENDER
1111 Third Avenue, Suite 1100
Seattle, Washington 98101
(206) 553-1100

Defender's Office was appointed to represent Petitioner on April 22, 1999. As of today's date, counsel for Petitioner has not received the Administrative File (A-file) from Respondent.

Petitioner's claim that he is being detained unconstitutionally is the same claim raised by over fifty other petitioners presently seeking relief in this district. By Order of the District Court for the Western District of Washington, Petitioner's case will be heard before a "panel" of all five district court judges along with four other "lead" cases. Counsel for Petitioner intends to perform a comprehensive review of the Petitioner's A-file, as well as independently investigate the individual circumstances of Petitioner's claims, which Petitioner anticipates will disclose additional facts supporting the above-stated claims.

The Petitioner reserves the right to assert additional facts once Respondent provides counsel with his INS administrative file, and in rebuttal to facts alleged by the INS in its brief in this proceeding.

18. Do you have any petition or appeal now pending in any court or administrative body as to the claims raised above? No.

19. Have you exhausted your administrative remedies with respect to the claims raised above?

See 17(D), above.

20. State the administrative remedies that you pursued?

(a) Nature of Review:

(b) Result:

21. Give the name and addresses, if known, of each attorney who represented you in the following stages of the underlying judgment:

(a) At preliminary hearing: N/A

(b) At arraignment and plea: N/A

(c) At change of plea: N/A

(d) At trial: N/A

(e) At sentencing: N/A

(f) On appeal: N/A

(g) In any post-conviction proceedings: N/A

(h) On appeal from any adverse ruling in post conviction proceedings: N/A

(i) Other:

(j) Other:

22. Do you have any future sentence to serve after you complete the sentence imposed by the underlying judgment in your case? No.

23. If you are seeking leave to proceed in forma pauperis, have you completed the sworn affidavit setting forth the required information? Yes.

PRAYER FOR RELIEF

Based upon the illegal and unconstitutional actions listed above, Petitioner requests that the Court grant his petition and direct respondent to release him from custody, as well as any other relief to which he may be entitled in this proceeding under 28 U.S.C. § 2241.

On information and belief, the foregoing information is true and correct.

Dated: April 23, 1999.

Respectfully submitted,

/s/

Jay Stansell
Assistant Federal Public Defender
Attorney for Petitioner Kim Ho Ma
Federal Public Defender
1111 Third Avenue, Suite 1100
Seattle, WA 98101
(206) 553-1100

CERTIFICATE OF SERVICE

I hereby certify that on this 23 day of April, 1999, I caused to have hand delivered the foregoing Amended Petition to:

Mr. Christopher Pickrell
Assistant United States Attorney
3600 Seafirst Fifth Avenue Plaza
800 Fifth Avenue
Seattle, Washington 98104

/s/ Theresa Simpson

APPENDIX H

U.S. Department of Justice
Immigration and Naturalization Service
Western Region, Seattle District

Office of the District Director

815 Airport Way South
Seattle, WA 98134
206-553-0936
April 13, 2000

Kim Ho MA, A27 365 395
20702 113th Place SE
Kent, WA 98031

Dear Sir:

In a letter dated April 4, 2000 I notified you that I was revoking your release under an Order of Supervision because I believe that you represent a threat to the public safety.

This letter is a notice to you that because of the recent decision by the 9th Circuit Court of Appeals in your favor in your *habeas corpus* case I am suspending that order to surrender. You need not appear to return to custody on April 19th as previously arranged through your attorney.

The order is not cancelled; it is only suspended pending further legal consideration of your case by the government. The fact that I suspend the order carries no implications regarding my continued belief that you are a threat to the public safety, as explained in the notice of April 4. The suspension also has no impact on the Order of Deportation entered against you on September 12, 1997, and affirmed by the Board of Immigration appeals on October 26, 1998.

You must continue to report under the Order of Supervision on the tenth of each month, or the next business day if the 10th falls on a weekend or holiday. You and your attorney will be notified of any further action, or requirements that may arise.
FOR THE DISTRICT DIRECTOR

/s/
George L. Morones
Assistant District Director for
Detention and Deportation
Seattle, Washington

[X] cc: Attorney of Record or Representative Federal Public Defender, Seattle

APPENDIX I

List of Pending Circuit Court and District Court Cases Known to Respondent's Undersigned Counsel

Third Circuit Court of Appeals

Cuesta-Martinez v. INS, No. 00-1921

Eleventh Circuit Court of Appeals

Prieto v. United States, No. 99-10545-B
Taylor v. United States, No. 99-12614-BB

District Courts

Armendariz-Montoya v. Sonchik, No. CV-00-0422-PHX-RGS (LOA) (D. Arizona)
Blanco Penalver v. McElroy, No. 98 Civ. 285 (MGC) (S.D.N.Y)
Leybinsky v. McElroy, No. 00-CV 4474 (LAP) (S.D.N.Y.)
Yngelmo v. Reno, No. 00-1035 (D.N.J.)
Del Risco v. Hansen, No. C-3-99-508 (S.D. Ohio)
Nguyen v. INS, No. 4-00-CV-90012 (S.D. Iowa)

FEDERAL PUBLIC DEFENDER
1111 Third Avenue, Suite 1100
Seattle, Washington 98101
(206) 553-1100

APPENDIX J

DISTRICT COURT-ORDERED RELEASES IN WESTERN DISTRICT OF WASHINGTON

Since the district court order in Phan v. Reno, 56 F.Supp.2d 1149 (W.D. Wash. 1999), but before the Ninth Circuit decision in Ma, 36 individuals have been ordered released by the district court for the Western District of Washington. And only 29 orders have been entered following the Ninth Circuit's decision in Ma.

DISTRICT COURT DECISIONS POST PHAN V. RENO: 36

Hanan Abdol v. Reno, C99-1056 (W.D. Wash. Dec. 10, 1999) (Vietnam),
appeal voluntarily dismissed, No. 00-35140 (9th Cir. May 18, 2000)
Columbus Agada v. Reno, C99-379L (W.D. Wash. Jan. 5, 2000) (Cameroon),
notice of appeal filed, No. 00-35257 (9th Cir. Mar. 22, 2000)
Raad Mfleh Almosawi v. Reno, C99-575C (W.D. Wash. Dec. 16, 1999) (Iraq),
notice of appeal filed, No. 00-35160 (9th Cir. Feb. 10, 2000)
Dennis Vladimirovich Batyuchenko v. Reno, C99-185R (W.D. Wash. Sept. 10, 1999) (Belarus),
notice of appeal filed, No. 99-36104 (9th Cir. Nov. 16, 1999)
Pey Bin v. Reno, C99-719C (W.D. Wash. Dec. 7, 1999) (Cambodia),
affirmed, No. 00-35171 (9th Cir. Aug. 11, 2000)
Phuoc Ngoc Bui v. Reno, C99-387P (W.D. Wash. Feb. 7, 2000) (Vietnam),
notice of appeal filed, No. 00-35300 (9th Cir. Mar. 31, 2000)
Panharith Chan v. Reno, C99-1091R (W.D. Wash. Dec. 7, 1999) (Cambodia),
no appeal timely filed
Mokthar Chebil v. Reno, C99-666Z (W.D. Wash. Jan. 27, 2000) (Algeria),
notice of appeal filed, No. 00-35270 (9th Cir. Mar. 16, 2000)
Bounthavy Choulamountry v. Reno, C99-281R (W.D. Wash. Nov. 11, 1999)(Laos),
affirmed, No. 99-36241 (9th Cir. Aug. 11, 2000)
Thong Vi Duong v. Reno, C99-930R (W.D. Wash. Jan. 28, 2000) (Vietnam),
notice of appeal filed, No. 00-35285 (9th Cir. Mar. 24, 2000)
Son Thai Huynh v. Reno, 56 F. Supp.2d 1160 (W.D. Wash. July 9, 1999) (Vietnam),
appeal voluntarily dismissed, No. 99-35703 (9th Cir. Dec. 22, 1999)
Vinh Ngoc Huynh v. Reno, C98-289R (W.D. Wash. Nov. 22, 1999) (Vietnam),
affirmed, No. 00-35090 (9th Cir. Aug. 14, 2000)
Phunyouphone Kanyavong v. INS, C99-1293 (W.D. Wash. March 1, 2000) (Laos),
affirmed, No. 00-35344 (9th Cir. June 28, 2000.)
Your Khorn v. Reno, C99-1455C (W.D. Wash. Feb. 10, 2000) (Cambodia),
affirmed, No. 00-35345 (9th Cir. June 28, 2000)

FEDERAL PUBLIC DEFENDER
1111 Third Avenue, Suite 1100
Seattle, Washington 98101
(206) 553-1100

Chanh Kotaveth v. INS, C99-529R (W.D. Wash. Dec. 3, 1999) (Laos),
notice of appeal filed, No. 00-35006 (9th Cir. Dec. 22, 1999)
Varant Krikorian v. INS, C99-1142C (W.D. Wash. Jan. 21, 2000) (Iraq/Turkey),
affirmed, No. 00-35262 (9th Cir. Aug. 15, 2000)
Piotr Lepesh v. INS, C99-35R (W.D. Wash. Nov. 23, 1999) (Kazakhstan),
notice of appeal filed, No. 00-35083 (9th Cir. Jan. 19, 2000)
Daren Lim v. Reno, C99-528Z (W.D. Wash. Dec. 9, 1999) (Cambodia),
affirmed, No. 99-36191 (9th Cir. Aug. 14, 2000)
Kim Ho Ma v. Reno, C99-151L (W.D. Wash. Sept. 29, 1999)(Cambodia),
affirmed, 208 F.3d 815 (9th Cir. Apr. 10, 2000).
Boudsakhone Nanthad[illegible]v. Reno, C99-576L (W.D. Wash. Oct. 26, 1999) (Laos),
notice of appeal filed, No. 00-35003 (9th Cir. Dec. 27, 1999)
Trung Quoc Ngu v. Reno, C99-609C (W.D. Wash. Feb. 3, 2000) (Vietnam),
notice of appeal filed, No. 00-35256 (9th Cir. Mar. 17, 2000)
Nam Nguyen v. Reno, C99-813L (W.D. Wash. Feb. 1, 2000)(Vietnam),
affirmed, No. 00-35291 (9th Cir. Aug. 14, 2000)
Nghia Phu Nguyen v. Smith, C99-637Z (W.D. Wash. Nov. 24, 1999) (Vietnam),
notice of appeal filed, No. 00-35084 (9th Cir. Jan. 19, 2000)
Vu Tien Pham-Nguyen v. Reno, C99-1105 R (W.D. Wash. Dec. 10, 1999) (Vietnam),
appeal voluntarily dismissed, No. 00-35141 (9th Cir.)
Vichai Saly v. Reno, C99-671R (W.D. Wash. Nov. 8, 1999) (Cambodia/Thailand),
affirmed, No. 00-35058 (9th Cir. Aug. 15, 2000)
Ros Samnang v. Reno, C99-579C (W.D. Wash. Nov. 29, 1999) (Cambodia),
notice of appeal filed, No. 00-35179 (9th Cir. Feb. 11, 2000)
Amanuel Samuel v. Reno, C99-968L (W.D. Dec. 17, 1999) (Eritrea),
no appeal timely filed
Seffatollah Sarmadi v. Reno, C99-388Z (W.D. Dec. 23, 1999) (Iran),
notice of appeal filed, No. 00-35189 (9th Cir. Feb. 16, 2000)
Khamsaene Sivongxay v. Reno, 56 F.Supp.2d 1167 (W.D. Wash. July 9, 1999) (Laos),
appeal voluntarily dismissed, No. 99-36063 (9th Cir. Dec. 14, 1999)
Sarith Som v. Reno, C99-811Z (W.D. Wash. Dec. 10, 1999) (Cambodia),
no appeal timely filed
Sounboon Srimeuangsam v. Reno, C99-673Z (W.D. Wash. Oct. 10, 1999) (Laos),
affirmed, No. 00-35007 (9th Cir. Aug. 11, 2000)
Chandary Tep v. INS, C99-1161P (W.D. Wash. Dec. 20, 1999) (Cambodia),
affirmed, No. 00-35236 (9th Cir. May 31, 2000)
Sokha Thorng v. Reno, C990833P (W.D. Wash. Dec. 21, 1999) (Cambodia/Thailand),
appeal dismissed, No. 00-35292 (9th Cir. May 5, 2000)
Arutyun Tsavoukyan v. Reno, C99-955Z (W.D. Wash. Feb. 28, 2000) (Armenia),
notice of appeal filed, No. 00-35401 (9th Cir. Apr. 25, 2000)

FEDERAL PUBLIC DEFENDER
1111 Third Avenue, Suite 1100
Seattle, Washington 98101
(206) 553-1100

Bunny Vath v. Smith, C98-1363R (W.D. Wash. Oct. 22, 1999) (Cambodia),
no appeal timely filed
Praseuth Vilayphonh v. Reno, C99-699P (W.D. Wash. Nov. 23, 1999) (Laos),
no appeal timely filed

DISTRICT COURT DECISIONS POST MA: 29

Oleg Babak v. Reno, C99-1389P (W.D. Wash. July 7, 2000) (Ukraine)
Guram Chachava v. INS, C99-1519L (W.D. Wash. April 19, 2000) (Georgia),
notice of appeal filed, No. 00-35577 (9th Cir. June 15, 2000)
Phallar Cheng v. INS, C99-1730P (W.D. Wash. May 2, 2000) (Cambodia),
notice of appeal filed, No. 00-35607 (9th Cir. July 1, 2000)
Sau Van Dinh v. Reno, C99-1170R (W.D. Wash. June 19, 2000) (Vietnam),
notice of appeal filed, No. 00-35710 (9th Cir. Aug. 10, 2000)
Van Ham v. Reno, C99-1813L (W.D. Wash. Aug. 3, 2000) (Cambodia)
Minh The Hoang v. INS, C99-1097L (W.D. Wash. July 7, 2000) (Vietnam)
Vu Khanh Hoang-Tuan v. Reno, C99-1200C (W.D. Wash. July 24, 2000) (Vietnam)
Minh Van Luu v. Reno, C99-967C (W.D. Wash. June 5, 2000) (Vietnam),
notice of appeal filed, No. 00-35669 (9th Cir. Aug. 4, 2000)
Oscar Madrid-Canul v. Reno, C99-153C (W.D. Wash. May 8, 2000) (Cuba)
Pao Mao v. INS, C99-0580L (W.D. Wash. June 14, 2000) (Cambodia),
notice of appeal filed, No. 00-35713 (9th Cir. Aug. 10, 2000)
Mong Duc Ngo v. INS, C99-1334Z (W.D. Wash. July 7, 2000) (Vietnam)
Minh Hoang Nguyen v. Reno, C99-812Z (W.D. Wash. July 7, 2000) (Vietnam),
notice of appeal filed, No. 00-35733 (9th Cir. Aug. 18, 2000)
Saroeut Ourk v. INS, C99-1740P (W.D. Wash. May 25, 2000) (Cambodia),
notice of appeal filed, No. 00-35645 (9th Cir. Ju.y 21, 2000)
Raul Rodriguez-Suarez v. INS, C99-1336L (W.D. Wash. July 5, 2000) (Cuba)
Kao Chow Saechao v. Reno, C99-1781P (W.D. Wash. Aug. 8, 2000) (Laos/Thailand)
Samoeun Sareth v. INS, C99-196P (W.D. Wash. April 25, 2000) (Cambodia),
notice of appeal filed, No. 00-35549 (9th Cir. June 16, 2000)
Sengchanh Savath v. Reno, C99-1739P (W.D. Wash. Aug. 8, 2000) (Laos)
Pavel Shtyba v. Reno, C99-335L (W.D. Wash. June 15, 2000) (Russia/Ukraine),
notice of appeal filed, No. 00-35711 (9th Cir. Aug. 10, 2000)
Vieng Sombath v. Reno, C99-1936R (W.D. Wash. July 31, 2000) (Laos)
Lay Srey v. INS, C99-1090Z (W.D. Wash. April 11, 2000) (Cambodia),
notice of appeal filed, No. 00-35544 (9th Cir. June 8, 2000)
Seth Themala v. Reno, C99-834Z (W.D. Wash. July 7, 2000) (Laos)
Quoc Hung Tran v. INS, C99-1116Z (W.D. Wash. May 10, 2000) (Vietnam),
notice of appeal filed, No. 00-35671 (9th Cir. June 30, 2000)

FEDERAL PUBLIC DEFENDER
1111 Third Avenue, Suite 1100
Seattle, Washington 98101
(206) 553-1100

Phaivanh Vilaysack v. Reno, C99-1963R (W.D. Wash. Apr. 28, 2000) (Laos),
notice of appeal filed, No. 00-35578 (9th Cir. June 20, 2000)
Ilya Volynets v. INS, C99-1092Z (W.D. Wash. May 5, 2000) (Ukraine),
notice of appeal filed, No. 00-35578 (9th Cir. June 30, 2000)
Khuong Minh Vu v. INS, C99-2090C (W.D. Wash. June 2, 2000) (Vietnam),
notice of appeal filed, No. 00-35663 (9th Cir. Aug. 4, 2000)
Sanxay Xayadeth v. INS, C99-1295L (W.D. Wash. July 27, 2000) (Laos)
Viraphonh Xayaphet v. Reno, C9901729C (W.D. Wash. April 28, 2000) (Laos),
notice of appeal filed, No. 00-35564 (9th Cir. June 20, 2000)
Shi Ming Yan v. INS, C99-2062R (W.D. Wash. Aug. 4, 2000) (China)

To date, the Ninth Circuit has summarily affirmed only 12 district court orders granting relief pursuant to Ma of the approximately 65 appeals by petitioners currently pending in the Ninth Circuit. And, as of today's date, the Ninth Circuit has refused to summarily affirm the district court orders, instead opting for full briefing, in Dennis Vladimirovich Batyuchenko v. Reno, C99-185R (W.D. Wash. Sept. 10, 1999) (deportation to Belarus or Russia not reasonably foreseeable); *appeal pending,* No. 99-36104 (9th Cir.) ; Piotr Lepesh v. INS, C99-35R (W.D. Wash. Nov. 23, 1999) (deportation to Kazakhstan not reasonably foreseeable), *appeal pending,* No. 00-35083 (9th Cir.); Arutyun Tsavoukyan v. Reno, C99-955Z (W.D. Wash. Feb. 28, 2000) (deportation to Armenia not reasonably foreseeable), *appeal pending,* No. 00-35401 (9th Cir.)

FEDERAL PUBLIC DEFENDER
1111 Third Avenue, Suite 1100
Seattle, Washington 98101
(206) 553-1100

APPENDIX K

1917 ACT

Sect. 19. That at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; any alien who shall have entered or who shall be found in the United States in violation of this Act, or in violation of any other law of the United States; any alien who at any time after entry shall be found advocating or teaching the unlawful destruction of property, or advocating or teaching anarchy, or the overthrow by force or violence of the Government of the United States or of all forms of law or the assassination of public officials; any alien who within five years after entry becomes a public charge from causes not affirmatively shown to have arisen subsequent to landing; except as hereinafter provided, any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the Untied states, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime of moral turpitude, committed at anytime after entry; any alien who shall be found an inmate of or connected with the management of a house of prostitution or practicing prostitution after such alien shall have entered the United States, or who shall receive, share in, or derive benefit from any part of the earnings of any prostitute; any alien who manages or is employed by, in, or in connection with any house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather, or who in any way assists any prostitute or

FEDERAL PUBLIC DEFENDER
1111 Third Avenue, Suite 1100
Seattle, Washington 98101
(206) 553-1100

protects or promises to protect from arrest any prostitute; any alien who shall import or attempt to import any person for the purpose of prostitution or for any other immoral purpose; any alien who, after being excluded and deported or arrested and deported as a prostitute, or as a procurer, or as having been connected with the business of prostitution or importation for prostitution or other immoral purposes in any of the ways hereinbefore specified, shall return to and enter the United States; any alien convicted and imprisoned for a violation of any of the provisions of section four hereof; any alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude, at any time within three years after entry, any alien who shall have entered the United States by water at any time or place other than as designated by immigration officials, or by land at any place other than one designated as a port of entry for aliens by the Commissioner General of Immigration, or at any time not designated by Immigration officials, or who enters without inspection, shall, upon the warrant of the Secretary of Labor, be taken into custody and deported.

FEDERAL PUBLIC DEFENDER
1111 Third Avenue, Suite 1100
Seattle, Washington 98101
(206) 553-1100

APPENDIX L

1952 Statute

Former Section 242(c), 8 U.S.C. § 1252(c), 66 Stat. 208 (1952), reads, in pertinent part:

Sec. 242(c) [8 U.S.C. § 1252 (1952)]

> When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detain, released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period. If deportation has not been practicable, advisable, or possible, or departure of the alien from the United States under the order of deportation has not been effected, within such six-month period, the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized in this section . . .

FEDERAL PUBLIC DEFENDER
1111 Third Avenue, Suite 1100
Seattle, Washington 98101
(206) 553-1100

APPENDIX M

1990 Amendments

Former Section 242 (formerly codified at 8 U.S.C. § 1252 (1991)) as amended by the Immigration Act of 1990 § 504, Pub. L. No. 101-649, 104 Stat. 4978, reads in relevant part:

Sec. 242 [8 U.S.C. 1252 (1991)]

(a) Arrest and custody; review of determination by court; aliens committing aggravated felonies; report to Congress committees

(1) Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. . . .

* * *

(2)(A) The Attorney General shall take into custody any alien convicted of an aggravated felony upon release of the alien (regardless of whether or not such release is on parole, supervised release, or probation, and regardless of the possibility of rearrest or further confinement in respect of the same offense). Notwithstanding paragraph (1) or subsections (c) and (d) of this section but subject to subparagraph (B) of this section, the Attorney General shall not release such felon from custody.

(B) The Attorney General shall release from custody an alien who is lawfully admitted for permanent residence on bond or such other conditions as the Attorney General may prescribe if the Attorney General determines that the alien is not a threat to the community and that the alien is likely to appear before any scheduled hearings.

* * *

(c) Final order of deportation; place of detention

When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney

FEDERAL PUBLIC DEFENDER
1111 Third Avenue, Suite 1100
Seattle, Washington 98101
(206) 553-1100

General's discretion, the alien may be detained, released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period. If deportation has not been practicable, advisable, or possible, or departure of the alien from the United States under the order of deportation has not been effected, within such six-month period, the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized in this section.

FEDERAL PUBLIC DEFENDER
1111 Third Avenue, Suite 1100
Seattle, Washington 98101
(206) 553-1100

CERTIFICATE OF SERVICE

No. 00-38

IN THE SUPREME COURT OF THE UNITED STATES

JANET RENO, et al.,

Petitioners,

v.

KIM HO MA,

Respondent.

I, Jay W. Stansell, a member of the Bar of this Court, hereby certify that on this 31st day of August, 2000, three copies of the Opposition to Petition for Writ of Certiorari in the above-entitled case were mailed, first-class postage prepaid, to Seth P. Waxman, Solicitor General of the United States of America, Department of Justice, 950 Pennsylvania Avenue NW, Washington, DC 20530-0001, counsel for Petitioners herein. I further certify that all parties required to be served have been served.

Jay W. Stansell
Assistant Federal Public Defender
1111 Third Avenue, Suite 1100
Seattle, WA 98101
(206) 553-1100
Counsel for Respondent Kim Ho Ma